IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 343

STATE OF NEW YORK, STATE OF DELAWARE, STATE OF INDIANA, ET AL., *Appellants*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, ET AL.

No. 344

STATE OF MAINE, STATE OF NEW HAMPSHIRE, STATE OF VERMONT, ET AL., *Appellants*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 345

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, BEAVER, MEADE AND ENGLEWOOD RAILROAD COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL., *Appellants*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF ALABAMA, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., (WESTERN RAILROADS).

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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OPINION AND REPORTS BELOW

The opinion of the District Court (R. 1411) is reported in 65 F. Supp. 856. The original and principal report

(R. 62) of the Interstate Commerce Commission (hereinafter referred to as "the Commission") is reported in 262 I. C. C. 447. The supplemental report of the Commission (R. 432) is reported in 264 I. C. C. 41.

JURISDICTION.

The final decree and order of the District Court was entered on May 27, 1946. (R. 1450.) The petition for appeal was filed by The Atchison, Topeka and Santa Fe Railway Company, *et al.*, Western railroads, on June 25, 1946 (R. 1475), and was allowed on the same day (R. 1483). The jurisdiction of this Court is invoked under Section 210 of the Judicial Code (38 Stat. 220; 28 U. S. C. Sec. 47a).

STATEMENT OF THE CASE.

This is an action to set aside, annul, and enjoin the enforcement of the reports and orders of the Commission in *Class Rate Investigation, 1939*, I. C. C. Docket No. 28300.

The decision of the Commission in this proceeding is generally recognized as the most momentous and far-reaching in the history of the Commission. Its tremendous importance is indicated by its broad geographical scope, by its immediate and far-reaching financial effect, and, above all, by the Commission's manifest purpose, not to use the power of regulation, as in the past, to require just and reasonable rates, but, instead, to use its power over rates to change, and in effect to regulate, the economy of the country.

The decision marks a complete break with the principles of rate-making that have been applied in this country for generations, by the Commission, by the courts, and by the

carriers. The Commission, in its report, referred to "the magnitude and complexity of the issues in these proceedings", (R. 70) and concluded that the provisions of the Transportation Act of 1940 had so changed the standards governing the lawfulness of rates and had so "enlarged the power of the Commission over this subject" (R. 304) that all the existing territorial differences in costs of transportation, density of traffic, composition and consist of traffic could and should be disregarded and flat uniform class rates made effective everywhere. In thus abandoning the criteria by which the lawfulness of rates has always heretofore been tested, the Commission now takes the view that it is unreasonable and discriminatory for different carriers operating in different territories to charge different rates, mile for mile, notwithstanding the fact that the costs and other transportation conditions are different, and the fact that the rates now condemned were established by the Commission itself as being just and reasonable in recognition of such different conditions. In short, it is held that under the new standard of rate-making it is unlawful for one whose honest and efficient cost is higher than another, to charge a higher price for his product. Four Commissioners dissented or concurred only in part. (R. 323, 324, 340.)

The Atchison, Topeka and Santa Fe Railway Company and thirty-two other Western railroads, (each of which is a carrier by railroad within Western Trunk Line Territory or Southwestern Territory or both) were the original plaintiffs in one of the two causes in the District Court and were intervening plaintiffs in the other cause. The two causes were consolidated by order of the District Court. (R. 881.)

This proceeding was initiated by the Commission to investigate the lawfulness of the interstate class freight rates throughout all the United States east of the Rocky

Mountains. (I. C. C. Docket No. 28300.) The Commission consolidated this investigation of the lawfulness of the class rates with another investigation of the lawfulness of the railroad classifications over the entire country. (I. C. C. Docket No. 28310.) Classifications are descriptive lists of commodities assigning them to particular classes for freight rate purposes. The class rates themselves are the transportation charges applicable to those commodities. Most of the less-than-carload freight in the Eastern and Western territories moves on these class rates. (Report, R. 184.) Carload freight, however, in all parts of the country, moves principally on other types of rates. (Report, R. 179.)

All the class rates under investigation here, with few exceptions, were prescribed by the Commission itself in extended proceedings only recently before the initiation of this investigation. (Report, R. 135-151.) The rates were set by the Commission on varying levels in the several class-rate territories, and in certain zones within those territories, reflecting the substantial differences in costs of transportation, density of traffic, revenue needs of the carriers and other traffic and transportation conditions, which, under the established principles of rate-making, always had been recognized as controlling by the Commission and by the courts.

Because of the substantially higher operating costs of the Western railroads, due to their lower density of traffic and other unfavorable transportation conditions in the West, the rates in the West, including the rates on class traffic, have always been substantially higher than in the Eastern portion of the country.[1]

In the present investigation, the Commission conducted extensive hearings and placed in the record the most com-

[1] Illustrative excerpts to this effect from Commission decisions are set out in Appendix D, this brief, page 194.

prehensive study ever made in this country of costs of railroad transportation. That cost study shows that the costs of Western railroads on both less-than-carload and carload traffic are very materially higher than the costs of either the Eastern or the Southern railroads.

The Commission decided that all territorial differences in the class rates should be held unlawful under the Interstate Commerce Act, as amended by the Transportation Act of 1940, and that all class rates east of the Rocky Mountains should be placed on a single uniform scale, which it set out in its report (R. 317), without regard for the territorial differences in costs or other transportation conditions. It held that all the class rates under investigation, which it had itself established and approved after extensive hearings and mature consideration, were unjust, unreasonable and unlawful because they were not uniform. All the class rates which it had previously established in the West and South at levels above the newly-prescribed uniform scale, would now be held to be unjust and unreasonable and therefore in violation of Section 1(4) and (5) (a) of the Interstate Commerce Act, as amended. All the class rates which it had previously established in Eastern Territory, at levels below the newly-prescribed uniform scale, similarly would be held to be unjust and unreasonable and therefore in violation of the said provisions of the Act. (R. 316.) The Commission further made a finding that all the intraterritorial class rates in Official Territory and all the interterritorial class rates from the other territories into Official Territory, all of which rates it had prescribed, were now discriminatory in violation of Section 3(1) of the Interstate Commerce Act, as amended by the Transportation Act of 1940. (R. 316.) The Commission relied heavily upon the legislative history of the amendment.

It will be shown in this brief, both by the language of

the "1940 amendments," and by their legislative history, that they were misconstrued by the Commission and that its decision thus rests on a mistake of law.

At the same time, the Commission decided that there should be a single uniform classification of commodities for use throughout the country. (R. 316.) With respect to the effective date of the newly-prescribed uniform scale of rates, it held: "That such revised uniform class rates and classification ratings shall be made applicable simultaneously." (R. 317.)

To effectuate its conclusion that all the presently effective class rates are unlawful because not uniform, and that uniform rates should be applied, the Commission ordered all the carriers east of the Rocky Mountains, including plaintiffs, to cancel the existing class rates and to maintain, during the period of preparation of the uniform classification, as an interim basis, new class rates which "will approach, as a preliminary step, the uniformity of class rate structure which we have previously found will be just, fair, and reasonable." (R. 318.) This so-called *ad interim* scale would reduce by ten percent the class rates of carriers in the Western territories where the cost of performing the service is highest. It would reduce, also by ten percent, the class rates of carriers in Southern Territory where the cost of performing the service is substantially lower than in the West. It would increase by ten percent the intraterritorial class rates of carriers in Official Territory where the cost of performing the transportation service is lowest. Finally, it would uniformly reduce by ten percent all interterritorial class rates among the several territories notwithstanding the varying costs. (R. 318-320.)[1]

[1] The interim reductions are subject to the prescribed permanent uniform rates as minimum rates (R. 318); the interim increases are not limited by the permanent rates (R. 319).

Petitions for reopening and reconsideration were filed by several parties. The petition of the Western railroads pointed out, in part, that the newly prescribed rates would increase the deficit which the Commission found already to exist in the transportation of less-than-carload traffic on the Western railroads and would be confiscatory. (R. 12670.)

On October 30, 1945, the Commission issued its supplemental report and order in which it rejected the petition of the Western railroads for reopening and reconsideration. (R. 469.) The supplemental report and order made certain minor changes in the original report and order, and included the explicit finding that the class rates in Official Territory are unreasonably low. (R. 477.) It provided that the newly prescribed interim rates should become effective on January 1, 1946.

After the complaints were filed in the District Court to set aside the orders, the court granted an injunction *pendente lite* on December 20, 1945. (R. 805.) The District Court held a hearing on February 18 to 21, 1946, inclusive, during which the court received certain additional testimony and exhibits relating to the issues of the confiscation which would be caused to the Western railroads if the proposed change in rates were to become effective.

The District Court filed its opinion on May 9, 1946, concluding that the petitions should be dismissed without prejudice to another suit by the Western railroads to enjoin the enforcement of the order after an experimental period. (R. 1439.) The opinion did not discuss the fact that the Commission had found the costs of the Western railroads to be substantially higher than the costs of either the Eastern railroads or the Southern railroads. It stated as a partial answer to the confiscation contention of the Western railroads, with respect to less-than-carload traffic, that "the railroads in Southern territory make no such

contention • • •" (R. 1437), thereby indicating that it apparently had overlooked the fact that the Commission had found the transportation costs of the Western railroads on less-than-carload traffic to be from 38 percent to 40 percent higher than the costs of the Southern railroads (R. 198). The District Court referred to an amendment to Section 3(1) of the Interstate Commerce Act, which amendment was enacted in the Transportation Act of 1940, and stated: "We may, indeed, take it for granted that they [the existing class rates] were lawful previous to the amendment since they had been in the main the result of comparatively recent investigations and orders of the Commission." (R. 1433.) The District Court approved the Commission's decision that the amendment and certain other provisions in the Transportation Act of 1940 had so changed the statutory power of the Commission, and the directions to the Commission from Congress, that the rate differentials reflecting territorial differences in costs and other transportation conditions had become unlawful. The District Court concluded that:

> "• • • in our opinion, Par. 3(1) now empowers the Commission to find such rates unlawful even though they would have been lawful in the light of all relevant considerations before the amendment." (R. 1433.)

The Commission based its decision upon its construction of the Congressional intent as shown in the Transportation Act of 1940 and in "the history of the times." (Report, R. 306.) The report and evidence emphasized a supposed policy to diffuse populations and to change occupations in the West and South from agriculture and other basic pursuits to manufacturing, through the method of setting uniform freight rates throughout the several territories. The District Court stated that it "might think that the probable import of this order" was "to try to equalize clearly inherently unequal business conditions

not due to existing freight rates in the various territories or any regions or districts therein, by manipulating rates." (R. 1436.) It found that it "does appear plausible" that "the investigations and order under review are the result of political agitation having for its ultimate object the dislocation of industry from Official territory and its establishment in the other territories * * *." (R. 1436.) The court, however, stated that it was "bound by the Commission's action in justifiably finding facts to give another, and lawful, basis for it" (R. 1436) under the construction placed by the Commission and the District Court on the Transportation Act of 1940. The court held that the fact that the ultimate object of the order was the dislocation of industry "is not within the bounds of judicial cognizance but relates to matters of legislative policy." (R. 1436-1437.)

Thereafter, the District Court, on May 24, 1946, entered its final decree and order continuing in effect the interlocutory injunction. (R. 1450.) In that final decree it found that "The relative levels of the class rates in the several rate territories affected by the orders of the Interstate Commerce Commission in this proceeding were established by orders of the Interstate Commerce Commission and have been in effect for many years." (R. 1451.) It found that "The Commission's orders, if presently enforced with respect to class rates charged on freight transported by the Western Lines, would cause a very substantial reduction in the revenues of the railroads[1] * * *." (R. 1452.)

[1] It has been estimated that the annual loss of revenue to the Western railroads under the *ad interim* rates would be approximately $14,000,000 and that the annual increase of revenues to the railroads in Official Territory would be approximately $16,000,000. Monthly Comment on Transportation Statistics, Bureau of Transport Economics and Statistics, Interstate Commerce Commission, July 7, 1945.

The District Court made the following conclusion of law in its final decree:

> "1. The decision of these consolidated causes necessarily involves the determination of novel questions of law of great importance to the shippers, the carriers, and the public of this country. There are reasonable and serious doubts as to the determination of these novel and important questions." (R. 1452.)

The boundaries of the several class rate territories are defined on the map which is inserted herein.[1] In general, the Eastern, Southern and Western railroads operate only in their respective territories, with a minor degree of overlapping. There are graduated levels of class rates in Zones A and B (New England) and Zone C of Official Territory, and in Zones I, II and III of Western Trunk Line Territory, reflecting the varying transportation conditions.

The single uniform scale of first-class rates found lawful by the Commission in this case for the entire country east of the Rocky Mountains is set out in the report at R. 381.[2] The corresponding present intraterritorial scales are set out as Appendix 8 at R. 359 to 361. The so-called "Eastern scale" or "basic Eastern scale" to which frequent reference is made in the Commission's reports, is the lowest of four graduated scales applicable in the different areas of Official Territory. (Report, R. 135, 136.) The Commission found in its supplemental report that the class rates on each of the four scales in Official Territory "are less than just and reasonable rates * * * and therefore unlawful, as well as unlawful because of their unduly preferential character * * *". (R. 467.)

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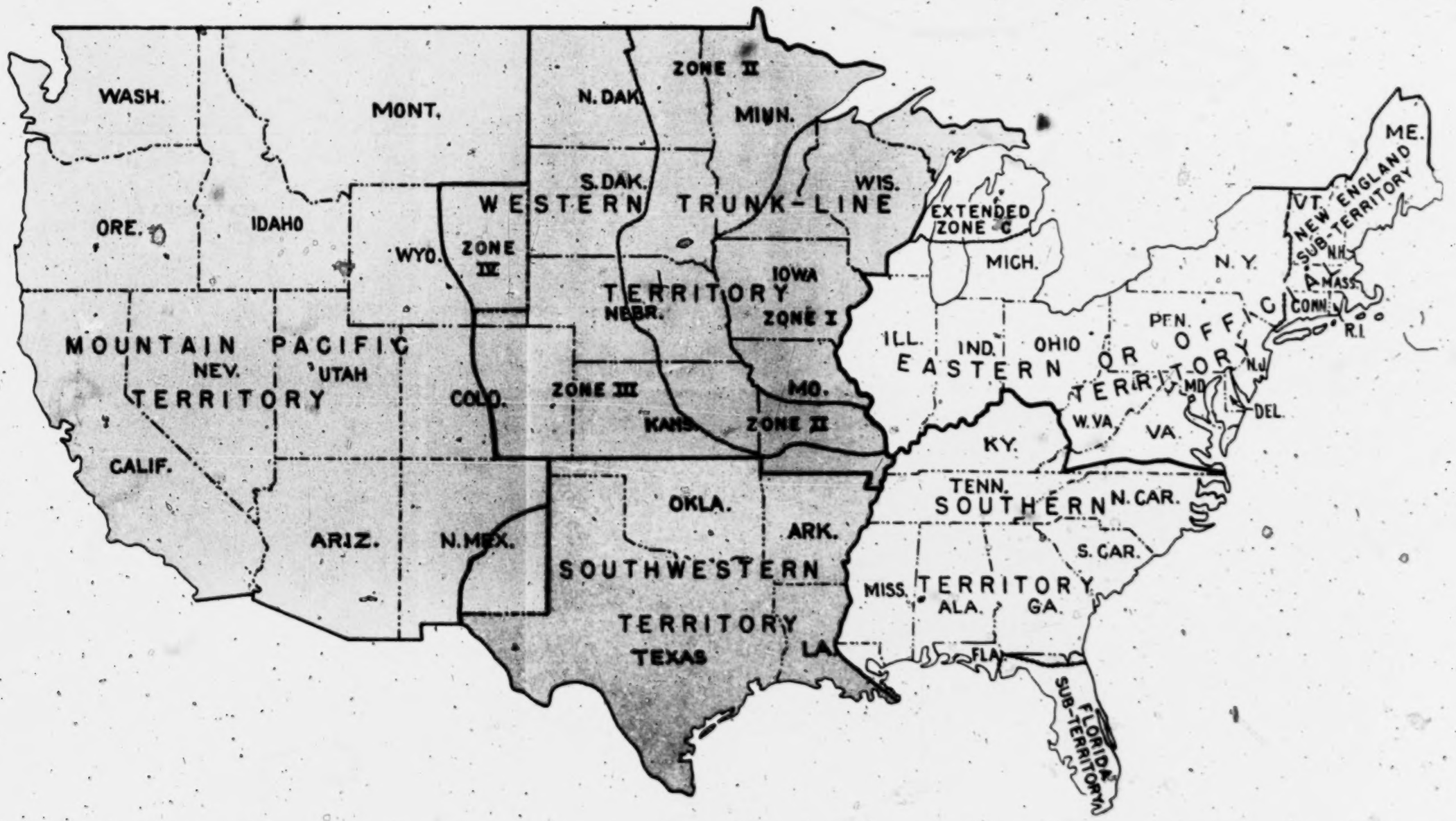
[1] As used on the map and in this brief, and generally in the Commission's reports (R. 131), the term "Official Territory" includes Illinois Territory.

[2] It is reproduced, for illustrative mileages, in Appendix A, this brief, page 191, together with the Western rates.



MAP OF RAILROAD FREIGHT RATE TERRITORIES

We believe that the construction placed upon the Transportation Act of 1940 by the Commission and by the District Court is erroneous. This misconstruction lies at the heart of the Commission's action. The extent of the changes which would be wrought in the principles of rate-making by that construction of the Transportation Act of 1940 may best be ascertained by a consideration of the Commission's extensive findings as to the differences in territorial costs and other transportation conditions, as well as a consideration of the findings with respect to populations and the extent of manufacturing, upon which so much emphasis has been placed in the report. In this brief, therefore, we shall first discuss the evidence and the Commission's findings which, we submit, not only lend no support to the order upon the hitherto established principles of rate-making, but, instead, impeach the Commission's ultimate conclusions. We shall thereafter discuss the statutory changes which were made in the Transportation Act of 1940, and the legislative history of those changes which proves that the intent of Congress was wholly misconstrued by the Commission. In a separate section we shall discuss the evidence showing that on less-than-carload traffic, the rates prescribed by the Commission, under its construction of the Transportation Act of 1940, would be confiscatory in their effect upon the Western railroads.

SPECIFICATION OF ERRORS TO BE URGED.

The District Court erred:

1. In failing to set aside and perpetually enjoin the enforcement of the orders of the Commission in *Class Rate Investigation, 1939*, I. C. C. Docket No. 28300, on the grounds that said orders are not adequately supported by evidence, are not adequately supported by findings of the Commission, and are arbitrary.

2. In failing to hold that the said orders were invalid on the ground that the Commission had misconstrued the Transportation Act of 1940, including the so-called Ramspeck Resolution contained therein, to be a mandate and authority to the Commission to establish uniform freight rates in the several rate territories notwithstanding substantial differences in the governing traffic and transportation conditions in the several territories, including the substantial differences found by the Commission in costs of transportation, composition and consist of traffic, density of traffic, and revenue needs of the carriers, and had based its orders upon such mistake of law.

3. In holding that the class rates which it found "were lawful previous to the amendment since they had been in the main the result of comparatively recent investigations and orders of the Commission" were made unlawful by the amendment to Section 3(1) of the Interstate Commerce Act contained in the Transportation Act of 1940, and in holding that the said amendment empowered the Commission to find such rates unlawful.

4. In failing to hold that the class rates prescribed in the Commission's orders for less-than-carload traffic in Western Trunk Line and Southwestern Territories would be confiscatory in violation of the Fifth Amendment to the Constitution of the United States.

5. In holding that the class rates prescribed by the Commission for less-than-carload traffic in Western Trunk Line and Southwestern Territories should be placed in effect for a trial period notwithstanding the fact that the undisputed evidence before the court proved such rates to be confiscatory in violation of the Fifth Amendment to the Constitution of the United States.

6. In failing to find that the said orders were invalid on the ground that the Commission, in making its finding that all interstate class rates throughout the nation east of the Rocky Mountains were unlawful, had arbitrarily disregarded the evidence and its own findings to the effect that the costs of transporting such traffic in Western Trunk Line and Southwestern Territories were and are far higher than in Official Territory or Southern Territory, and to the effect that the traffic and transportation conditions in the several rate territories involved are substantially different, one from the other, and because such different conditions prove the legality of the present rates and render unlawful the said orders of the Commission.

7. In failing to find that the said orders were invalid on the ground that the Commission, in holding that the relation between the interterritorial class rates from points in Western Trunk Line and Southwestern Territories to points in Official Territory and the intraterritorial class rates in Official Territory is unlawful, had arbitrarily disregarded the evidence and its own findings to the effect that the costs of transporting such interterritorial traffic were and are substantially higher than the costs of transporting such intraterritorial traffic, and that the governing traffic and transportation conditions in the several territories were and are substantially unlike.

8. In failing to find that the said orders were invalid on the ground that the Commission had arbitrarily dis-

regarded the evidence and its own preliminary findings that the long-established differences in class rates in Official Territory and in Western Trunk Line and Southwestern Territories were and are justified, under the recognized principles of rate-making, by the differences in costs of transportation, composition and consist of traffic, density of traffic, and the revenue needs of the carriers.

9. In failing to hold that the Commission had acted arbitrarily in finding the class rates to be unjust and unreasonable under Section 1(4) and Section 1(5)(a) of the Interstate Commerce Act notwithstanding (a) that the Commission itself had prescribed such rates, (b) that such rates were lawful and held by the District Court to be lawful prior to the Transportation Act of 1940, (c) that there had been no intervening change in said Section 1(4) and Section 1(5)(a), and (d) that there was no evidence and no finding of any intervening change in transportation conditions of such a nature as to support a finding that the said rates are unjust or unreasonable.

10. In holding the said orders to be valid because the Commission had found facts to give a formal basis for the orders despite the finding by the District Court that the probable import of the orders was "to try to equalize clearly inherently unequal business conditions, not due to existing freight rates in the various territories or any regions or districts therein, by manipulating rates."

11. In holding that the statutory control over rates which has been confided to the Commission is sufficiently comprehensive to empower the Commission to hold rates unlawful solely because of the different levels of such rates, and despite substantial differences in transportation costs and other factors which constitute the lawful and governing standards of rate-making.

12. In adopting the facts found by the Commission as

"ultimate findings" of the Commission, and the facts found by the Commission in Part III of its original report herein.

13. In failing to hold that the Commission's orders were invalid under Section 3(1) of the Interstate Commerce Act on the ground that none of the carriers involved in the alleged discrimination has any common control over the interterritorial class rates from Western Trunk Line and Southwestern Territories into Official Territory and the intraterritorial class rates in Official Territory, and that the said orders did not leave the respondent carriers the alternative of removing any discrimination found to exist by increasing the rates found to be preferential or by decreasing the rates found to be prejudicial.

SUMMARY OF ARGUMENT.

The ultimate finding and conclusion of the Commission that it is unlawful for the Western railroads to charge higher rates than are just and reasonable for the Eastern and Southern railroads is predicated not upon evidence, but upon the erroneous conclusion that the Transportation Act of 1940 constituted a directive to the Commission to prescribe uniform rates in the several territories. The Commission construed that legislation to change the standards of rate-making so drastically that all the territorial class rates which had been prescribed by the Commission itself only shortly before that legislation, as being just, reasonable and non-discriminatory, were unlawful when tested by the new legislation.

Pursuant to its conception of the meaning and intent of the 1940 legislation, the Commission held that the higher transportation costs of the Western railroads, measured by the Commission itself through an exhaustive cost study, must be disregarded, and the rates of the Western railroads reduced to the level of rates found just and reasonable for other railroads in other parts of the country where the operating costs are lower and the traffic and transportation conditions much more favorable than those in the West. The relative territorial costs, as found by the Commission in this proceeding, show that the costs of the Western railroads for all traffic are more than 21 percent higher than the costs of the Eastern railroads. They show that the costs of the Western railroads for less-than-carload traffic, most of which is carried on the class rates at issue here, are from 28 percent to 40 percent higher than those of the Eastern railroads. They show that the Western costs for carload traffic are 16 percent to 18 percent higher than the Eastern costs and more than 60 percent higher than the

costs in one section of Eastern territory. Similarly, in comparison with the Southern railroads, the Commission found that the less-than-carload costs of the Western roads are 38 percent to 46 percent higher and that the carload costs of the Western railroads are 8 to 16 percent higher than the costs of the Southern railroads.

The Commission also found that the transportation conditions in the West are so unfavorable that the Western railroads must operate with only one-third the traffic density of the Eastern railroads, with the result that in the West one ton of traffic must bear many elements of expense which are shared by three tons of traffic in the East. It found that historically the rates of the Western railroads have been higher than in either the East or the South and that, despite the higher rate level, the average Western rate of return, because of the high Western costs, has been materially less than the rate of return on the railroads in any other territory. The Commission found, moreover, that the consist of the Western traffic contains a greater proportion of commodities the rates on which produce smaller profit margins than is the case with the Eastern and Southern railroads. All these basic factors, the Commission, for the first time in its history, would now ignore, in the belief that it is directed to establish uniform rates to effectuate a supposed national policy of diffusing the national population throughout the several territories, of reducing the number of persons engaged in agriculture and other basic industries in the West, and increasing the proportion of the country's manufacturing that is performed in the West.

We do not ask the Court to review the wisdom or lack of wisdom of such a policy, but we earnestly submit that the Commission and the District Court erred in holding that Congress has decreed any such policy. Congress has

neither directed nor authorized the Commission to effectuate any such plan, or to prescribe rates which do not reflect the governing traffic and transportation conditions under which the service is performed. This Court has long insisted that the Commission has no power to test the lawfulness of railroad rates by considerations of industrial regulation and that "the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."[1]

The arbitrary character of the Commission's decision is highlighted by the fact that the reduced rates prescribed for less-than-carload traffic in the West would be substantially below the cost of transportation as determined by the Commission and shown on the face of its report. Both the interim and permanent rates would be less than the costs of carrying the class-rate traffic, as found by the Commission itself. This is true both on the basis of the normal peacetime loading, and on the heavier loading required since the fall of 1942 by the Office of Defense Transportation as an emergency order. The basic out-of-pocket expenses alone, as found by the Commission, *exceed* the reduced rates prescribed by the Commission. The Commission found that these specific partial costs of carrying the less-than-carload traffic exceed the rates. It found in explicit terms that all Western less-than-carload traffic is carried at existing rates at a very heavy deficit. Nevertheless, for the purpose of creating uniformity with the lower cost Eastern and Southern railroads, the Commission ordered a reduction in the Western rates which would greatly increase the Western deficit. With these facts proved by the Commission's own cost studies and recorded

[1] Mr. Justice Brandeis, speaking for the Court in *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 524 (1924).

in the Commission's own findings, it was error for the Commission to order the reductions.

The Commission's interpretation of the Transportation Act of 1940, including the Ramspeck Resolution, as constituting a direction to it to bring about uniform rates in the several territories and henceforth to give only such effect to the transportation conditions and standards as might be consistent with that new factor of rate-making is contrary to the language of that legislation and to its legislative history. The Commission relied for its interpretation upon certain excerpts of that history and upon what it referred to as the "history of the times." The actual legislative history proves that the Congress considered and refused to enact each of several bills which were offered to bring about the uniformity which the Commission believes, nevertheless, to be required by the 1940 Act, in derogation of the established principles of rate-making. The Senate and the House, after the rejection of the bills for uniformity, passed that 1940 Act only after the most solemn assurances that: "The bill does not mean that rates are to be equalized." (Committee Chairman, Senator Wheeler); "This provision does not broaden the authority of the Interstate Commerce Commission in the slightest degree." (Senator Wheeler); "There was no preference shown as between one locality and another or as between one commodity and another in any unfair and unjust manner. We propose in this act to continue the same policy." (Representative Murdock); "It does not provide for a thing more than the Interstate Commerce Commission now has authority to do." (Representative South). The Commission erred in holding that the Ramspeck Resolution, and the other provisions of the Transportation Act of 1940 intended or accomplished such a change in rate-making standards that all rates which are not identical mile for mile are unlawful. Because of

that mistake of law, this Court should set aside the Commission's order, just as it set aside an earlier order of the Commission based upon a similar misconstruction of the Hoch-Smith Resolution.

The Commission's order would seriously impair the ability of the Western railroads to maintain an adequate transportation service, but the Commission acted without any consideration of that factor. Relying upon a construction of the 1940 amendments to the Interstate Commerce Act, and upon evidence relating alike to all traffic, the Commission holds that to be lawful the class rates in the West must be identical mile for mile with those to be applied in the East. The Commission entirely ignored the fact that all of the major railroads but one, relying solely upon operations within the Western rate territories here involved have recently suffered bankruptcy under a rate structure substantially higher than that in the East. At the very time the Commission was purporting to appraise the reasonableness of the Western rates it was in the process of finding, in proceedings under Section 77 of the Bankruptcy Act, that the revenues of the Western roads had not been sufficient to cover the true, actual costs of performing the transportation service, and, as a result, that more than a billion dollars of their common and preferred stocks had become worthless. In thus requiring rate uniformity as between the East and the West, without the slightest consideration of the fact that the Western roads had failed to meet their higher costs and sustain their solvency on a rate structure substantially higher than the rate level in the East, the Commission acted so arbitrarily as to deny due process.

The Commission holds that the interterritorial rates between the West and the East are discriminatory to the extent that they exceed the rates found lawful for application wholly within the Eastern Territory. Under

the decisions of this Court, no carrier can be guilty of discrimination within the meaning of Section 3(1) of the Interstate Commerce Act unless that carrier has control over both rates. None of the carriers has any such common control over the class rates found to be discriminatory in this proceeding. Mere participation in a joint rate does not constitute control over the measure of that rate. If either the Eastern or Western carriers withdrew from the joint interterritorial rate that action would make applicable the combination of local rates, and thus increase the disparity between such rates and the rates in the East. Moreover, the Western carriers do not participate in, have no responsibility for, and do not have the slightest control over the rates maintained by the Eastern carriers within Eastern Territory. The Commission's decision that the Ramspeck Resolution of 1940 had so enlarged its powers that it could hold the rates to be unlawfully discriminatory on the facts here, and, on that basis, could and should enter an order prescribing uniform rates, was a misconstruction of that Resolution and should be set aside as a mistake of law.

ARGUMENT.

I.

THE COMMISSION'S ORDER IS ARBITRARY BECAUSE IT IS NOT SUPPORTED BY, AND IS CONTRARY TO, THE COMMISSION'S FINDINGS AND THE EVIDENCE.

It has long been settled that an order reducing rates which is without support in the evidence is arbitrary and a denial of due process. Neither the existence of a large record, nor the affording of a full opportunity to be heard, is sufficient to save such action. In the words of Mr. Justice Brandeis, speaking for a unanimous Court:

> "An order based upon a finding made without evidence, *The Chicago Junction Case*, 264 U. S. 258, 263, or upon a finding made upon evidence which clearly does not support it, *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 547, is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process. Compare *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, 348." *Northern Pacific Ry. Co.* v. *Department of Public Works*, 268 U. S. 39, 44-45 (1925).

In that case, sometimes called the *Washington Log Case*, the railroad rates on logs were attacked before the state regulatory agency on the ground "that the rate structure lacked uniformity" and that the rates were excessive and discriminatory. Full hearings were held. "Much evidence was introduced." The agency found that the existing rates were highly remunerative, ordered the cancellation of proposed higher rates and established a uniform distance tariff on a reduced rate basis, for an experimental period. The order was assailed in Court both upon the ground

that there was a denial of due process because the findings were arbitrary and unsupported by the evidence and upon the ground that the newly prescribed rates were confiscatory. This Court held that the ultimate findings had been made upon evidence which clearly did not support them, and that the order therefore constituted a denial of due process.

The principle of the *Washington Log Case* applies with full effect to the Commission's order here. We shall show that the evidence and preliminary findings on which the Commission acted, both as to costs and as to the other governing transportation conditions, afford no rational support for the conclusion holding the Western rates to be unlawful to the extent that they exceed the new uniform scale.

A.

IN HOLDING THE RATES IN THE WEST TO BE UNLAWFUL UNLESS MADE IDENTICAL, MILE FOR MILE, WITH THOSE IN THE EAST AND SOUTH, THE COMMISSION ARBITRARILY DISREGARDED ITS OWN FINDINGS THAT THE COSTS OF THE WESTERN RAILROADS GREATLY EXCEED THE COSTS OF THE EASTERN AND SOUTHERN RAILROADS FOR TRANSPORTING FREIGHT AN EQUAL DISTANCE.

The basic importance of costs in the comparison of territorial rates[1] caused the Commission in this proceeding to prepare, through its own experts, the most elaborate special cost studies in the history of rate regulation. The details of the preparation of these studies are set forth in the Commission's report at length, starting at R. 186. It is these studies to which the Commission referred as

[1] "Since the inception of Federal regulation of common carriers cost of service has been recognized as one of the basic elements entering into the process of making and judging rates." (Report, R. 307.)

distinguishing the present investigation from the many previous investigations, as follows:

> "More specifically, cost of service has been explored and analyzed more comprehensively and thoroughly than in any other similar investigation." (Report, R. 303.) "While perfection has not been attained, we are convinced that the studies made and presented by members of our staff as evidence in this proceeding possess sufficient attributes of accuracy to enable us to rely upon them in reaching our conclusions." (Report, R. 308.)

We shall show from the findings of the Commission itself that it not only did not rely upon its own cost determination in reaching its final conclusions regarding the lawfulness of the Western rates, but, in fact, issued its order in complete disregard of its findings as to the higher costs of transportation in the West.

The Commission's cost studies were prepared by the Commission's Cost Section under the direction of its head cost analyst, Dr. F. K. Edwards. (Report, R. 186.) Since the volume of detailed information which is necessary in the preparation of such a study cannot be found in the regular reports to the Commission, elaborate questionnaires were sent to the railroads and answered by them. The Cost Section then divided the expenses for the many railroads into various groups. Expenses of the out-of-pocket nature were segregated from those which are constant. Each category was then divided into components such as running, switching, station, etc. expenses. These components were then further subdivided. For example, running expenses (for carload service) were subdivided among (a) freight-train car maintenance and rental expense, (b) common running expenses including specified kinds of interchange and switching expenses, and (c) all other running expenses of specified kinds. The sev-

eral groups of running expenses were then distributed over the traffic on various bases. Similar divisions, subdivisions and allocations were made for the many other categories of railroad expenses. (Report, R. 186 to 190.)

The cost studies used in the previous investigations, and the evidence of cost as shown by such factors as density of traffic and comparisons of rates of return (after allowance for differences in rates) had all pointed to the existence of substantially higher transportation costs, mile for mile, in the West than in the East or in the South. Those same comparisons were made in this proceeding and were expressed in findings which demonstrated that the earlier conclusions were correct. But, the Commission pointed out, comprehensive and reliable cost studies of the character achieved in this case were available for the first time.

Based upon those studies, the Commission made express, detailed and repeated findings in its reports in this proceeding that *the transportation costs of the Western railroads are not only not uniform with the costs of the Eastern and Southern railroads but are by far the highest transportation costs in the country.* The findings show that the Western costs are so high that the Western railroads, which have suffered bankruptcy under their higher level of rates, simply could not live on a rate level as low as that of the Eastern roads. These are findings of the Commission itself spread upon the face of its reports in this proceeding. Whatever evidence or Congressional direction the Commission thought would justify its requirement that the rates be placed on the same mileage scale in the West that it found to be just and reasonable for the East and South, was something far removed from its detailed findings of the relative costs of performing the transportation service.

The cost findings were expressed in several different types of cost comparisons by the Commission. It is unneces-

sary to ask the Court to test the accuracy, or to examine into the details of the Commission's cost studies, but we do earnestly ask the Court to review the results of the studies as expressed in the findings of fact, and to consider whether they could afford any rational justification of the Commission's decision holding that the Western rates are unlawful under the Interstate Commerce Act, as amended, unless they are made identical, mile for mile, with the rates in the East and South where the costs are found to be substantially lower.

We shall first discuss the findings which show the overall comparison for the test year, and then discuss each of the several cost comparisons, first between the West and the East and ther between the West and the South.

1.

The Commission's Findings Show That the Western Freight Transportation Costs For All Traffic Are More Than 21 Percent Higher Than the Eastern Costs on the Same Traffic.

A fundamental demonstration of the relative level of transportation costs in the West and the East is made by the Commission's comparison of the revenue levels (*i. e.*, the levels of rates on traffic actually moved), in the two territories and of the resulting rate of return on the Commission's own valuation of the two groups of roads. If the transportation costs were substantially uniform in the two territories, the higher level of rates in the West would produce a much higher rate of return than in the East. But the net railway operating income of the Western railroads is shown by this study to be on a much *lower* basis than that of the Eastern railroads *despite the fact that the rates of the Western railroads are higher than the Eastern*

railroads. The difference discloses the degree by which the costs in the West exceed those in the East.

The Commission's Cost Section compared the revenue levels in a detailed study for the test year, 1939, and the results were incorporated in the Commission's findings at R. 219 to 220.[1] The Commission found that the Western revenue level was more than 15.2 to 16.6 percent higher than the Eastern revenue level,[2] (Report, R. 221), but, notwithstanding these higher Western rates, the rate of return earned by the Western roads was only 2.47 percent while the rate of return earned by the Eastern roads (on their lower rates) was 3.15 percent.[3] (Ex. 196, p. 46, R. 11404; offered at R. 4352.[4]) In other words, the Commission found that it costs the Western railroads so much more to carry the Western traffic that the higher Western rates fell short of meeting the great difference in costs in the two territories. To overcome this higher cost handicap in the test year, so that the rate of return would have been as high as that of the Eastern railroads, the Commission's study and findings show the Western revenue level would

[1] Following the test year, 1939, traffic and transportation factors were distorted by war conditions. (R. 1804, 4785.)

[2] The Commission points out that this comparison was made on a gross revenue basis rather than a net revenue basis and sets out a table showing that on the more proper net revenue basis the amount by which the Western revenue level exceeded the Eastern revenue level was somewhat greater than the figures set out above.

[3] The bases on which these returns were computed were not the Commission's physical valuations under Section 19a of the Act, but were its lower "rate-making values furnished by the Bureau of Valuation *for the purpose of this study.*" (Ex. 2, p. 48, R. 5190; offered at R. 1558.)

[4] The printed record incorrectly reverses the numbers on Exhibits 195 and 196 at R. 11257 and R. 11357, as is apparent by reference to the testimony at R. 4349 and R. 4352. To avoid ambiguity, however, we shall refer in this brief to the numbers as they appear in the printed record.

have had to be, not 16.6 percent, but *more than 21 percent higher* than in the East.[1]

The full significance of the difference in the Western and Eastern revenue levels is apparent when the net railway operating incomes of the Western and Eastern railroads for that period are compared. The total actual Western net railway operating income for that period was only $178,115,556. Despite the lower Eastern revenue level, the transportation costs of the Eastern railroads were so much lower than the costs of the Western railroads that the Eastern railroads were able to enjoy a net railway operating income of $252,863,974. (Ex. 66, Sec. II, p. 9, R. 7619; offered at R. 2219.) If the Western railroads had been forced to reduce their rates to a revenue level identical with the Eastern revenue level, the net railway operating income of the Western railroads would have been reduced by $183,270,259, which is 16.6 percent of the actual

[1] The basic data underlying this computation are as follows: The net railway operating income of the Western District Class I railroads in 1939 was $178,155,556. (R. 7619.) Since that figure represents a return of 2.47 per cent (R. 11404), it would had to have been increased to $227,151,417 in order to produce a return of 3.15 per cent (R. 11404), which was the Eastern rate of return in that year. (In each instance the return is based on the Commission's own valuation.) The difference between those two figures is $49,035,861. If this amount is added to the actual 1939 Western District gross freight revenue of $1,289,979,579 (R. 11373), a constructive gross freight revenue of $1,339,015,440 is obtained. This constructive gross freight revenue is 121 per cent of the amount which the Commission found the Western railroads would have received on their 1939 traffic if their revenues had been on the lower Eastern average level. Actually, because of additional taxes and other charges that would be incurred if the gross freight revenue had been so increased, an increase in gross freight revenue of more than 21 per cent would have been required in order to increase the net railway operating income in the Western District by $49,035,861, and thus place the two groups of roads on the same earning basis.

Western gross freight revenues of $1,289,979,579. (Ex. 196, p. 15, R. 11373; offered at R. 4352.) *This means that if the low Eastern rates had applied to the Western railroads in the test year, the Western railroads would have had an operating deficit of $5,154,703, as compared with the net railway operating income of $252,863,974 enjoyed by the Eastern railroads on that same revenue level.* It would be impossible to state the critical nature of this issue to the Western roads more clearly than it appears from these comparisons of territorial costs as established by the Commission's Cost Section.

Conversely, in order to have earned the same rate of return that the Eastern roads earned, the Western roads would have had to so increase their higher rates as to produce additional revenue of more than $49,035,861, which would have made their revenue level more than 21 percent higher than the revenue level of the Eastern roads. The exact amount cannot be ascertained from the Commission's reports but, since the necessary increase in the revenue level would have resulted in increased taxes and other charges against gross revenues, the Western revenue level must have been increased to a level substantially greater than 21 percent above the Eastern level to produce a parity of earnings.

The Commission thus proved on this record that the higher rate level which it had established in the Western territory in previous cases was vitally necessary for those railroads (and for the public which relies upon this service) because of the higher cost of transportation in the West. *The higher cost basis in the West would have left an actual operating deficit to the Western roads from the same revenue level that produced a 3.15 percent return for the Eastern roads.*

2.

The Commission Found That the Western Railroads' Costs of Transporting Less-Than-Carload Freight Are From 28 Percent to 40 Percent Higher Than the Costs of the Eastern Railroads and That, Despite the Higher Western Rates, the Western Railroads Incurred a Much Greater Deficit In Carrying Such Traffic.

The Commission's extensive cost studies compared the costs of transporting different categories of freight in the West and in the East. The major breakdown of costs was between less-than-carload freight and carload freight. The findings with respect to less-than-carload freight are particularly important in this proceeding, since the large proportion of all such traffic, in both the West and the East, moves on the class rates. (Report, R. 184.)

The Commission made findings as to the relative territorial cost indexes for that less-than-carload traffic for hauls of 100, 300 and 500 miles, respectively. (Report, R. 198.) These territorial indexes are expressed in the findings in terms of the United States average cost as being represented by an index of 100. The subtraction of the low Eastern index from the high Western index, of course, does not measure the percentage by which the Western costs exceed the Eastern costs. In the table below, which is reproduced from the Commission's findings, there have therefore been added the percentages by which the Commission found the Western costs to exceed the Eastern costs. In comparing these costs for the actual conditions in the several territories, the Commission made separate findings for the two major parts of the Eastern class rate territory, but did not combine those figures to show an index for the Eastern class rate territory as a

whole. The Commission's' findings were as follows (Report, R. 198):

RELATIVE TERRITORIAL COST INDEXES FOR LESS-THAN-CARLOAD TRAFFIC BASED ON ACTUAL AVERAGE LOAD.

CLASS RATE TERRITORY	COST INDEXES
Eastern:	
(a) Eastern including New England but excluding Pocahontas	
100 miles	92
300 miles	93
500 miles	94
(b) Pocahontas	
100 miles	88
300 miles	87
500 miles	87
Western:	
100 miles	123
300 miles	121
500 miles	120
Percent by which Western costs are higher than Eastern costs:	
(a) Western compared with higher cost portion of Eastern (basis of (a) above):	
100 miles	West 33.7% higher
300 miles	West 30.1% higher
500 miles	West 27.6% higher
(b) Western compared with lower cost portion of Eastern (basis of (b) above):	
100 miles	West 39.8% higher
300 miles	West 39.1% higher
500 miles	West 37.9% higher

The foregoing findings of the Commission, therefore, are that, mile for mile, *it costs the Western railroads from 27.6 percent to 39.8 percent more to transport less-than-carload freight than it costs the Eastern railroads to transport such freight.*

It is perhaps significant of the Commission's general approach, as shown throughout its reports, that when it expressed the foregoing tabulated findings in the textual form, the only comparison it mentioned (other than its general finding that "the less-than-carload costs in the West are higher than those in the East" [Report, R. 199]), was for the particular mileage that shows the lowest spread between the West and the East (27.6 percent) and for that particular part of the Eastern class rate territory which also shows the lowest territorial difference.[1] The Commission's textual summary was as follows:

> "The relative territorial costs of less-than-carload traffic, for a haul of 500 miles, based on actual average loads are 5 to 8 percent higher in the East, including New England but excluding Pocahontas, than in the South. *Costs in the West are 27 percent higher than in the East, including New England but excluding*

[1] The Commission includes the higher cost New England territory and excludes the lower cost Pocahontas territory. The costs of the Pocahontas lines are less than those of the other Eastern railroads, and if included would reduce the average cost for the East, and increase the difference between the cost levels of the East and the West. The Commission therefore at several places states the costs of the Pocahontas roads separately or not at all. But the Commission would make no such distinction in respect to rates. It would require that the class rates in the West be identical with those prescribed for the East as a whole *including* the low cost Pocahontas lines. In the light of that fact we ask the Court particularly to note the striking disparity between the costs in the Pocahontas part of Eastern Territory and the costs in the West. In this connection it may be noted that in stating the Western costs the Commission declined to exclude the lower unit costs of the ore-carrying roads, declaring that "the intent of the cost study was to reflect territorial average operating conditions." (Report, R. 203; see also R. 273.)

Pocahontas. Less-than-carload traffic as a whole, is carried at a deficit in all territories, except possibly in the South." (Report, R. 206.)[1]

The findings of the Commission just summarized compare the actual costs. The Commission also made findings comparing the territorial less-than-carload costs on an assumed identical load of five tons per car, which was below the actual loading made possible by the heavier concentration of traffic in the East, and above the Western actual loading, although it made no finding that transportation conditions in the East would so change in the foreseeable future as to yield that lower loading, nor that transportation conditions in the West after the emergency would so improve as to produce that hypothetical level. Notwithstanding the absence of any such finding or expectation to give pertinence to such data, and even on the basis of that assumption which has, and is asserted to have, no basis in fact, the Commission found that the Western transportation costs would substantially exceed the Eastern costs for every mileage and for every territorial comparison. The cost comparisons on this hypothetical basis were as follows (Report, R. 198):

RELATIVE TERRITORIAL COSTS FOR LESS-THAN-CARLOAD TRAFFIC ON HYPOTHETICAL BASIS OF ASSUMED IDENTICAL LOADING.

CLASS RATE TERRITORY	COST INDEXES
Eastern:	
(a) Eastern including New England but excluding Pocahontas:	
100 miles	98
300 miles	101
500 miles	103

[1] Emphasis in quotations in this brief is ours unless otherwise indicated.

Class Rate Territory	Cost Indexes
(b) Pocahontas	
100 miles	89
300 miles	89
500 miles	88
(c) Eastern combined, including New England and Pocahontas	
100 miles	97
300 miles	100
500 miles	101
Western:	
100 miles	114
300 miles	109
500 miles	107

Percent by which Western costs on the assumed identical load would be higher than Eastern costs:

(a) Western compared with higher cost portion of Eastern (basis of (a) above):

100 miles	West 16.3% higher
300 miles	West 7.9% higher
500 miles	West 3.9% higher

(b) Western compared with lower cost portion of Eastern (basis of (b) above):

100 miles	West 28.1% higher
300 miles	West 22.5% higher
500 miles	West 21.6% higher

(c) Western compared with Eastern combined (basis of (c) above):

100 miles	West 17.5% higher
300 miles	West 9.0% higher
500 miles	West 5.9% higher

In addition to the findings showing the territorial indexes for costs of less-than-carload traffic in the West to exceed such costs in the East, the Commission made a direct

comparison of costs, revenues and deficits arising from less-than-carload traffic in the several territories. (Report, R. 200.) In that comparison, the combined Eastern Class Rate Territory is not shown, but is divided between (a) Eastern, including New England but excluding Pocahontas, and (b) Pocahontas. The Commission found that, *despite the higher level of rates in the West*, the costs of the Western railroads are such that the Western railroads suffered an actual deficit on less-than-carload traffic. Moreover, the Commission found that this deficit in the West was the largest deficit incurred in the handling of this traffic anywhere in the country.

With total less-than-carload revenues of $88,797,938, the Commission found that the Western railroads had failed by $34,348,277, to earn enough to cover their out-of-pocket costs plus total expenses solely related to less-than-carload traffic, plus collection and delivery expense. In contrast, the Eastern railroads, by reason of their lower costs, had much smaller deficits despite their lower rates. The results of the comparative figures as found by the Commission are as follows (Report, R. 200):

LESS-THAN-CARLOAD COMPARISONS OF REVENUES AND DEFICITS.

	Total Western Class Rate Territory	Eastern Other Than Pocahontas	Excess Deficit in West
-than-carload revenues	$88,797,938	$107,155,756	.....
cits on basis of:			
Total solely related expenses plus collection and delivery	34,348,277	26,153,151	$7,738,391

Reduced to a unit basis to emphasize the meaning of the findings, the Commission thus found that the deficit per ton of less-than-carload traffic carried[1] was as follows:

DEFICIT PER TON CARRIED.

	Western Territory	Eastern Other Than Pocahontas
Deficit on basis of total expenses solely related to less-than-carload plus collection and delivery expenses	$7.07	$3.75

The Commission's finding that the deficits from less-than-carload traffic in the West, (most of which is carried on the class rates which are here in issue), far exceed such deficits in the Eastern part of the country, notwithstanding the higher rates in the West, again confirms and verifies the Commission's findings that the Western costs of transportation exceed the Eastern costs by a greater margin than has been covered by the existing higher level of rates in the West. When it came to make its order, the Commission arbitrarily and irrationally disregarded its own findings by ordering a *reduction* of the rates in the West, which were found to have produced the greatest deficit, while, at the same time, ordering an *increase* in the rates in the East where the deficit was much less.

[1] Tons of less-than-carload traffic carried in test year (Ex. 13, Table 6, fn. 9, pp. 10 and 12; R. 5971, 5973; offered at R. 1742):

(a) Eastern other than Pocahontas. 6,979,744 tons
(b) Pocahontas ..... 422,150 tons
(c) Eastern combined ..... 7,401,894 tons
(d) Western ..... 4,860,219 tons

3.

The Commission Found That the Western Costs For Carload Traffic Are 16 Percent to 18 Percent Higher Than the Costs In the Eastern Class Rate Territory as a Whole and Are More Than 60 Percent Higher Than the Costs In the Pocahontas Region of Eastern Territory.

The Commission made detailed findings of the relative territorial costs of transporting carload traffic based upon its elaborate special cost studies. The findings were expressed in a table similar to the table in which the Commission set out its findings as to the relative costs of less-than-carload traffic. The Commission's findings of these carload costs in the test year, 1939, based on the actual conditions in the several territories, were as follows (Report, R. 194):

RELATIVE TERRITORIAL COST INDEXES FOR ALL CARLOAD TRAFFIC ON BASIS OF ACTUAL AVERAGE LOAD.

CLASS RATE TERRITORY	COST INDEXES
Eastern:	
(a) Eastern including New England but excluding Pocahontas.	
100 miles	103
300 miles	102
500 miles	102
(b) Pocahontas.	
100 miles	68
300 miles	67
500 miles	66
(c) Eastern combined, including both New England and Pocahontas (no finding for 100 or 500 miles).	
300 miles	95

Western:

100 miles	110
300 miles	110
500 miles	110

Percent by which Western carload costs are higher than Eastern costs:

(a) Western compared with the higher cost portion of Eastern (basis of (a) above).

100 miles	West 6.8% higher
300 miles	West 7.8% higher
500 miles	West 7.8% higher

(b) Western compared with lower cost portion of Eastern (basis of (b) above).

100 miles	West 61.8% higher
300 miles	West 64.2% higher
500 miles	West 66.7% higher

(c) Western compared with total Eastern (basis of (c) above).

300 miles	West 15.8% higher

In addition to the foregoing findings showing how much higher the Western carload costs are than are the Eastern carload costs, the Commission made similar findings on the hypothetical basis of assumed identical loads. Here again, as in the case of the less-than-carload traffic, the Commission made no findings that the transportation conditions in the West would improve, or were expected to improve, to make that higher load a reality. Nevertheless, even on that hypothesis, the Commission found that the costs of the Western railroads would still be much higher than the Eastern costs. The Commission's findings were as follows (Report, R. 194):

RELATIVE TERRITORIAL COST INDEXES FOR ALL CARLOAD TRAFFIC ON ASSUMED BASIS OF IDENTICAL LOADS.

CLASS RATE TERRITORY	COST INDEXES
Eastern:	
(a) Eastern including New England but excluding Pocahontas.	
100 miles	102
300 miles	102
500 miles	101
(b) Pocahontas.	
100 miles	68
300 miles	67
500 miles	66
(c) Eastern combined, including New England and Pocahontas (no findings for 100 or 500 miles).	
300 miles	95
Western:	
100 miles	108
300 miles	108
500 miles	108
Percent by which Western carload costs are higher than Eastern costs on the hypothetical identical load basis:	
(a) Western compared with higher cost portion of Eastern (basis of (a) above).	
100 miles	West 5.9% higher
300 miles	West 5.9% higher
500 miles	West 6.9% higher
(b) Western compared with lower cost portion of Eastern (basis of (b) above).	
100 miles	West 58.8% higher
300 miles	West 61.2% higher
500 miles	West 63.6% higher
(c) Western compared with total Eastern (basis of (c) above).	
300 miles	West 13.7% higher

Comparison with the findings of the Commission in the first table above shows that these latter findings on the hypothetical basis are understatements of the difference in costs. The *actual* Western carload costs were found to be higher than Eastern costs by substantially greater percentages than appear immediately above.

The Commission's findings of the territorial differences in costs in the test year were confirmed by its finding as to the relative costs over the ten-year period of 1930 through 1939. In that separate study the costs were compared on the basis of an assumed identical consist of traffic. The Commission stated, with regard to that ten-year period:

> "A comparison with the East, including the Pocahontas region [*i. e.*, the entire Eastern class rate territory] and using the eastern consist of traffic, shows the *Western costs to be higher by 18 percent.*" (Report, R. 198.)

Moreover, the Commission found that even if (1) the Pocahontas Region, which is the low cost region of the Eastern class rate territory, is omitted from the comparison, and (2) if New England, the highest cost region in the East (where the Commission has established rates on two graduated scales higher than the Eastern rates) is included, the overall average costs in the West for that period would still substantially exceed the Eastern costs. (Report, R. 197.)

To summarize the findings as to the comparative territorial transportation costs, the Commission found that the costs in the West were neither uniform nor substantially uniform with the costs in the East. It found that the overall average costs in the West exceed those in the East by more than 21%. As to carload traffic, it found that for the test year the average unit Western costs exceeded the average in the Eastern class rate territory by 16 percent. It found that even if the transportation conditions in the

Western territory were so improved that the loads in the several territories were identical, the average Western carload costs would have been 14 percent higher than the average Eastern costs.

Breaking down the Eastern class rate territory into its higher and lower cost areas, the Commission found that the average Western costs exceed the costs even in the higher cost area of Eastern class rate territory (in a large part of which the Commission has established class rates on levels higher than the so-called Eastern scale) by from 6 to 8 percent and exceed the costs in the other portion of Eastern class rate territory by 59 to 67 percent. Finally, for the ten-year period 1930-1939, the Commission found that the average Western costs were 18 percent higher than the average Eastern costs.

4.

The Commission Found That the Western Costs For Boxcar Traffic and Gondola and Hopper Car Traffic at the Average Haul Are 13 Percent and 24 Percent Higher Respectively Than the Eastern Costs.

The Commission made detailed findings as to the relative territorial costs of the traffic carried in boxcars or gondola and hopper cars, and found that the Western costs greatly exceed the Eastern costs on that traffic. It found that the full costs, based on the actual territorial conditions, were as follows (Report, R. 192):

RELATIVE CARLOAD COSTS FOR TRAFFIC MOVING IN BOXCARS, GONDOLA AND HOPPER CARS.

CLASS RATE TERRITORY	COST INDEXES	
	BOXCARS	GONDOLA HOPPER
EASTERN:		
(a) Eastern including New England but excluding Pocahontas		
100 miles	104	102
300 miles	103	100
500 miles	102	99
(b) Pocahontas		
100 miles	70	65
300 miles	68	63
500 miles	67	63
(c) Eastern combined, including New England and Pocahontas		
100 miles	99	95
300 miles	96	93
500 miles	96	93
WESTERN:		
100 miles	107	115
300 miles	108	115
500 miles	108	114
Percent by which Western costs are higher than Eastern costs		
(a) Western compared with the higher cost portion of Eastern (basis of (a) above)		
100 miles	West 2.9% higher	12.7% hi
300 miles	West 4.8% higher	15.0% hi
500 miles	West 5.9% higher	15.1% hi
(b) Western compared with the lower cost portion of Eastern (basis of (b) above)		
100 miles	West 52.8% higher	77.0% hi
300 miles	West 58.8% higher	82.5% hi
500 miles	West 61.2% higher	80.9% hi
(c) Western compared with total Eastern (basis of (c) above)		
100 miles	West 8.0% higher	21.0% hi
300 miles	West 12.5% higher	23.7% hi
500 miles	West 12.5% higher	22.6% hi

It will be seen that the Western costs exceed the Eastern costs for every territory and every mileage shown in the Commission's finding. There is no uniformity of costs between the West and the East; consistently, by varying percentages up to 83 percent, the Western costs were found to be higher. The Commission found that the 300-mile haul "most closely approximates the length of haul in each territory in 1939." (Report, R. 190.) At that mileage the Commission found that the average Western costs for traffic carried in boxcars were 13 percent higher than the average Eastern costs. It also found that the average Western costs for traffic carried in gondola and hopper cars were 24 percent higher than the average Eastern costs.

The Commission made comparisons of costs for this traffic on the purely supposititious basis (explained in the section above), of an identical load per car being carried in each territory. Even on this hypothetical basis, the Commission found that the average costs in the West would exceed the Eastern costs for every mileage, and, moreover, would exceed the costs in every portion of the East except in New England, where the rates, in recognition of the higher costs, have been established by the Commission at levels higher than the so-called Eastern scale. (Report, R. 191, 192.) The average full costs in the West for such traffic were found, even on that hypothesis, to be higher than the average full costs in Eastern class rate territory by 9.1%, 12.5% and 13.7%, respectively, for the hauls of 100, 300 and 500 miles. The Western costs on gondola and hopper car traffic were found to be higher than the Eastern costs on that same basis by 14.7%, 15.9% and 17.2%, respectively.

5.

The Commission Found That the Transportation Costs In the West Greatly Exceed the Transportation Costs In the South.

The findings of the Commission discussed thus far related to the West-East comparison, showing how much higher are the Western costs than are the costs in Eastern class rate territory, which comprises the northeast section of the country. But the Commission also found that the Western costs are substantially higher than the costs in the South.

Because of the genesis and the whole background of this proceeding the major part of the Commission's discussion of costs concerns the cost relationship of the South and the East. Indeed, the Commission stated that it found the Southern class rates to be unreasonably high as compared with the Eastern rates because of its conclusion that the difference in costs between the South and the East is not substantial. What the Commission did when it came to its order with respect to Western rates, however, was to order that those rates should be lowered to match the rates found reasonable for the East and South, despite the fact that it found that in both of these latter territories the costs are far lower than in the West. The arbitrary nature of that conclusion is illuminated by the strong emphasis and reliance which the Commission placed on what it deems a substantial parity of cost between the East and South.

(a).

THE COMMISSION FOUND THAT THE ACTUAL LESS-THAN-CARLOAD TRAFFIC COSTS IN THE WEST ARE 38 PERCENT TO 46 PERCENT HIGHER THAN IN THE SOUTH.

The Commission found that the actual Western costs of hauling less-than-carload traffic are higher than the Southern costs by from 38 percent to 46 percent; the cost difference on this traffic being even greater than between the West and the East. The comparison, together with the comparison on the hypothesis of identical loading, was tabulated as follows (Report, R. 198):

LESS-THAN-CARLOAD COSTS IN WEST AND SOUTH.

CLASS RATE TERRITORY	COST INDEXES	
	ASSUMED IDENTICAL LOAD	ACTUAL
Southern:		
100 miles	84	84
300 miles	87	86
500 miles	88	87
Western:		
100 miles	114	123
300 miles	109	121
500 miles	107	120
Percent by which Western costs are higher than Southern costs:		
100 miles	West 35.7% higher	46.4% higher
300 miles	West 25.2% higher	40.7% higher
500 miles	West 21.6% higher	37.9% higher

These findings, together with the findings set out above with regard to the Eastern costs, belie any pretense that cost or transportation conditions are uniform or anywhere near uniform between the West and the South or between the West and the East. The Commission's findings and the studies on which they rest condemn the order requiring

the Western rates to be made uniform with the rates in the South and East.

Confirming the foregoing findings, the Commission found that the costs of less-than-carload traffic in the South are substantially covered by the rates received, whereas the costs in the West are so much higher that, even with class rate scales higher than in the South, the Western railroads have had to transport that traffic at a deficit of from $26,000,000 to $34,000,000. The tabulated findings in this respect were as follows (Report, R. 200):

LESS-THAN-CARLOAD COMPARISONS OF COSTS, REVENUES AND DEFICITS.

	SOUTHERN TERRITORY	WESTERN TERRITORY
Less-than-carload revenues	$46,635,725	$88,797,93
Less-than-carload income or deficit:		
(a) Basis of total expenses solely related to less-than-carload plus collection and delivery expenses	Deficit 815,459	Deficit 34,348,27
(b) Basis of adjusted expenses solely related to less-than-carload plus collection and delivery expenses	Income 1,698,293	Deficit 26,240,17

The Commission also commented in the text of its report upon the great deficit in covering the costs of this traffic in the West as contrasted with the situation in the South where the difference between revenues and expenses is slight. (Report, R. 312.)

Reduced to a unit basis, the Commission found that for all the less-than-carload traffic carried by the Western railroads, the higher costs produced a deficit of $5.40 per ton carried, on the adjusted basis. In contrast, the Southern railroads, on the adjusted basis, made a profit

of $0.68 per ton carried. On the first basis the Southern railroads had a deficit of only $0.33 per ton as compared with the Western deficit of $7.07 per ton.[1]

(b).

THE COMMISSION FOUND THAT THE WESTERN CARLOAD COSTS ARE FROM 8 PERCENT TO 16 PERCENT HIGHER THAN THE SOUTHERN COSTS.

The Commission's findings as to the extent by which the Western costs of carload traffic exceed the Southern costs for such traffic were stated as follows (Report, R. 194):

Class Rate Territory	Cost Indexes Based on Assumed Identical Load	Actual
Southern:		
100 miles	94	96
300 miles	98	101
500 miles	100	102
Western:		
100 miles	108	110
300 miles	108	110
500 miles	108	110
Percent by which Western costs are higher than Southern costs		
100 miles	West 14.9% higher	14.6% higher
300 miles	West 10.2% higher	8.9% higher
500 miles	West 8.0% higher	7.8% higher

(c).

THE COMMISSION FOUND THAT THE WESTERN COSTS FOR BOXCAR TRAFFIC AND GONDOLA AND HOPPER CAR TRAFFIC AT THE AVERAGE HAUL ARE 11 PERCENT AND 13 PERCENT HIGHER, RESPECTIVELY, THAN THE SOUTHERN COSTS.

The Commission's findings comparing the Western costs on boxcar traffic with the Southern costs were as follows (Report, R. 192):

[1] The Southern railroads in the test year carried 2,498,735 tons of less-than-carload traffic, and the Western railroads carried 4,860,219 tons of such traffic. (Ex. 13, Table 6, fn. 9, pp. 10, 12; R. 5971, 5973; offered at R. 1742.)

Class Rate Territory	Cost Indexes Based on Assumed Identical Load	Actual
Southern:		
100 miles	92	94
300 miles	96	97
500 miles	98	99
Western:		
100 miles	107	107
300 miles	108	108
500 miles	108	108
Percent by which Western costs are higher than Southern costs		
100 miles	West 16.3% higher	13.8% higher
300 miles	West 12.5% higher	11.3% higher
500 miles	West 10.2% higher	9.1% higher

The Commission's findings comparing the Western costs and the Southern costs on gondola and hopper car traffic were as follows (Report, R. 192):

Class Rate Territory	Cost Indexes Based on Assumed Identical Load	Actual
Southern:		
100 miles	95	98
300 miles	99	102
500 miles	101	104
Western:		
100 miles	109	115
300 miles	109	115
500 miles	109	114
Percent by which Western costs are higher than Southern costs		
100 miles	West 14.7% higher	17.3% higher
300 miles	West 10.1% higher	12.7% higher
500 miles	West 7.9% higher	9.6% higher

In connection with these costs of boxcar traffic and gondola and hopper car traffic, the Commission made separate findings for the costs in the State of Kentucky,

which is a border state between Southern and Eastern territories. The Commission heretofore has established interstate class rates in Kentucky on a basis only slightly higher than the basic Eastern scale. (Report, R. 251) In the present proceeding it has decided that Western class rates are unlawful unless reduced to a basis which will be identical with rates found by it to be just and reasonable for Kentucky. How far it was necessary for the Commission to go in disregard of its own findings to reach that conclusion is apparent from the following findings of the Commission comparing the boxcar costs in the West with those in Kentucky (Report, R. 192):

Territory	Cost Indexes Based on Assumed Identical Loading
Kentucky	
100 miles	76
300 miles	77
500 miles	77
Western	
100 miles	107
300 miles	108
500 miles	108
Percent by which Western costs are higher than Kentucky costs	
100 miles	West 40.8% higher
300 miles	West 40.2% higher
500 miles	West 40.2% higher

The cost comparisons between West and Kentucky on gondola cars show an even greater disparity of costs. (Report, R. 192.)

6.

The Commission Made No Cost Studies of the Comparative Territorial Costs Later Than for the Test Year, 1939, But Found That Other Data Indicated Higher Costs in the West Than in the East or South.

The preparation of the Commission's elaborate cost studies in this proceeding required an immense amount of time and of effort, both by the Commission's staff and by the carriers, as is indicated by the description of these studies in the Commission's report. The Commission made no territorial cost studies for any later period. There are certain cost comparisons in the record for the period 1937-1941 between the East and the South, but no such comparison was made for the West for that period. (Report, R. 197, 198.)

The only cost figures for the West for any year after the test year, 1939, were the simple cost comparisons per revenue ton-mile, and similar general figures, for 1941. The Commission found that such comparisons are unreliable for purposes of territorial cost comparisons and stated its criticisms of a similar computation as follows:

> "Witness for the State of New York introduced comparisons of the costs per revenue ton-mile for various groups of railroads in the South and East. Such comparisons of revenue ton-mile costs, however, are subject to the following criticisms: No separation was made between line and terminal with the result that, other factors being equal, the territory having the longest average haul per shipment would inevitably have the lowest cost per revenue ton-mile, the terminal expenses being spread over more ton-miles. No separation was made between classes of equipment, the low cost per revenue ton-mile for heavy loading coal traffic being combined on a weighted-average basis with the higher ton-mile cost for manufactured prod-

ucts. Other factors being equal, the region having the greatest proportion of coal traffic would, under such a procedure, show the lowest cost. No effort was made to accumulate the cost on the basis of homogeneous service units required in the handling of each class of traffic in each class of equipment, such as was accomplished in the Edwards studies." (Report, R. 205.)

Although the Commission thus found that comparisons of costs per revenue ton-mile were not reliable or informative, it noted that such data "indicate" that the unit costs both in the East and in the West had been reduced somewhat between 1939 and 1941 by the great increase of traffic (Report, R. 201)[1] incident to the transition to the emergency wartime economy. The Commission found that the volume of war traffic which the Western roads were called upon to handle had increased much more rapidly than had the traffic in the Eastern class rate territory. In the Pocahontas region of Eastern class rate territory, the traffic had increased only 27 percent, and in the remainder of Eastern class rate territory the increase was only 43 percent, as compared with an overall average increase in the West of 46 percent. Thus the traffic increase in Western traffic was somewhere from 3 to 19 percentage points greater than the traffic increase in the areas that comprise the Eastern class rate territory. Because of that added traffic the figures for cost per revenue ton-mile showed a decrease in the West and South of approximately 10 percent and a decrease in the East of approximately 5 percent. (Report, R. 201.)

In view of the wartime conditions existing in 1941, and the Commission's findings as to the lack of merit in costs per revenue ton-mile for comparative purposes, the figures

[1] The only cost figures for 1941 are of the same type as the ones which the Commission criticized above, and are subject to the same criticism. (Report, R. 201.)

mentioned above have little, if any, value. An actual cost study for 1941, similar to the one for 1939, would provide the vast number of adjustments which must be made to create a reliable cost indicator.[1] However, it is of interest to note that if the respective 5 percent and 10 percent changes could properly be used in connection with the Commission's cost findings for the test year, 1939, they would show that even in the abnormal year of 1941, notwithstanding the faster increase in traffic, the unit costs of transportation on Western roads continued to be very substantially higher than on the Eastern roads. For example, the Eastern carload cost index of 95 would be reduced to approximately 90, whereas the Western carload cost index of 110 would be reduced only to approximately 99. The Eastern less-than-carload cost index of 92 for the 100 mile haul (even excluding the lower-cost Pocahontas region) would be reduced in 1941 to approximately 87, as compared with the reduction of the Western index from 123 to approximately 111. Thus, on these illustrative comparisons, the Western costs, even in 1941, despite a faster increase in the war traffic of the Western railroads, would range from 10 percent to 28 percent *higher* than the comparable figures for the Eastern class rate territory.

Change in the volume of freight traffic affects differently the unit costs in the East and in the West. As the volume of traffic increases, the reduction in the unit costs is greater in the West than in the East. Conversely when traffic falls

[1] The Commission's cost studies for the test year, 1939, were prepared and submitted by its head cost analyst, Dr. F. K. Edwards. Dr. Edwards testified, in response to a question from Chairman Aitchison, that the 1939 studies could not be brought down to a later date simply by the use of the annual reports (which show cost per revenue ton-mile) but that "we would practically have to repeat our process." (R. 1563.) That was not done and the record contains no cost study for the year 1941.

off, the increase in unit costs is greater in the West than in the East. The Commission explains the reason for this as follows:

> "The reason apparently lies in the fact that the East, with its higher traffic density, is closer to the maximum capacity of the plant than is true in the other districts and hence the influence of added traffic on costs is here greater." (Report, R. 201.)

The corollary is that with the return of normal economic and traffic conditions, the costs in the West will rise more rapidly than the costs in the East, thereby accentuating the territorial cost differences.

It should be emphasized again that there were no cost studies for the Western railroads for any year later than 1939, and that the only figures for 1941 to which the Commission refers were those of the type which the Commission specifically found to be untrustworthy as a basis for comparing territorial costs. (Report, R. 205.) The only evidence of record relied upon by the Commission to establish the degree by which the Western costs exceed the Eastern costs was the evidence for 1939 and for the years 1930-1939.

B.

THE COMMISSION ARBITRARILY DISREGARDED ITS FINDINGS THAT THE TRAFFIC DENSITY ON THE EASTERN RAILROADS IS APPROXIMATELY THREE TIMES AS GREAT AS ON THE WESTERN RAILROADS.

The Commission has always recognized that no other single factor affects unit costs as directly as does traffic density. It found here that the traffic density of the Western railroads is not only not uniform or substantially uniform with the density of the Eastern railroads but, in fact, is only one-third of that of the Eastern railroads. This is a fact of the highest significance. It means

that in the West one ton must bear many elements of expense which in the East are spread over three tons. But the Commission totally disregarded the evidence and its own findings of these dissimilar transportation conditions by ordering the Western railroads, despite their relatively light traffic, to reduce their rates for the purpose of establishing a blanket equality of rates with the heavy density roads in the East.

The importance of the density factor has been recognized time and again, both in the decisions of this Court and of the Commission. The "primary importance" which the Commission has attached to traffic density in the past is illustrated by its discussion of that factor in *Refined Petroleum Products in the Southwest,* 171 I. C. C. 381, 400 (1931) as follows:

> "One factor of primary importance in determining the general rate level on a particular line or in a particular territory is traffic density, which indicates the quantity of traffic that must bear the cost of transportation. The density of traffic depends upon the quantity of through or overhead traffic and also the quantity of local traffic originating or terminating on that line or in that territory. These factors, in turn, are influenced by such matters as population, productiveness of the area traversed, the amount of railroad mileage within the area, the quality of the service, and other matters. The quantity of traffic originating or terminating on a particular line indicates in a general way the amount of traffic that must bear the terminal expense."

In the opinion of Mr. Justice Brandeis for the Court in the *Washington Log Case* (*Northern Pacific Ry. Co.* v. *Department of Public Works*), 268 U. S. 39, 44 (1925) it was said:

> "In this unit cost figure [relied upon by the rate fixing agency] no account is taken of the differences

in unit cost dependent, among other things, upon differences in the length of haul; in the character of the commodity; in the configuration of the country; *in the density of the traffic*; in the daily loaded car movement; in the extent of the empty car movement; in the nature of the equipment employed; in the extent to which the equipment is used; in the expenditures required for its maintenance. Main line and branch line freight, interstate and intrastate, car load and less than car load, are counted alike. The Department's error was fundamental in its nature. The use of this factor in computing the operating costs of the log traffic vitiated the whole process of reasoning by which the Department reached its conclusion."

The effect of density of traffic was expressly recognized and its importance restated by Senator Wheeler, Chairman of the Committee on Interstate Commerce, in the discussions leading to the Transportation Act of 1940, when he explained why there was no intention in that Act to equalize the rates in the various classification territories, as follows:

"Likewise, we must recognize the fact that railroad transportation service and rates depend somewhat on *the intensity of the traffic*. In long stretches of territory with no traffic, shippers must pay more for railroad service than do shippers in a densely settled part of the country where traffic is plentiful and where there is much competition from busses, trucks, and things of that kind." (Cong. Rec., Vol. 84, Part 6, p. 5890.)

And in the House of Representatives, in the discussions leading to that same Act, Representative Halleck, who was then a member of the Committee on Interstate and Foreign Commerce, in explaining why that Committee had rejected proposals for rate equality, stated:

"You can find differences in the freight rates within some sections of the country and official territory, but people will fairly explain to you that those differences

result from differences in *the density of traffic* and a lot of other situations that do not really involve unjust discriminations." (Cong. Rec., Vol. 84, Part 9, p. 9879.)

In the light of these explicit declarations of Congressional intention to recognize and preserve the traditional importance of density of traffic as a standard for rate-making, and not to impose any overriding requirement of rate uniformity, it is highly important to examine the findings made by the Commission as to the comparative density of traffic East and West. These findings are as follows:

FREIGHT TRAFFIC DENSITY.

1941 Revenue Ton Miles Per Mile of Line.

Eastern:	
Eastern District (other than Pocahontas)	3,392,964
Pocahontas Region	7,519,840
Western (overall)	1,358,041
Eastern Section	1,377,089
Western Section	1,006,144
Southwestern Territory	1,017,337

(Report, R. 270, 292, except Pocahontas averages from Ex. 66, Sec. H, p. 5, R. 7615; offered at R. 2219.)

The density of traffic in the Pocahontas region of Eastern class rate territory is five and one-half times as great as on the Western railroads, and the density in the remainder of the Eastern class rate territory is two and one-half times as great as on the Western railroads. There is only one state (Minnesota) in the entire Western District in which the density is as much as one-half the average Eastern density. But the Commission was at pains to make these fundamental findings only to disregard them. They are given no consideration in the conclusion that the rates in the West, where the traffic density is only about one-third of that in the East, and one-sixth of that in the Pocahontas region, are unjust and unreasonable unless reduced to equality with the rates found to be just and reasonable in

the East. In so doing, the Commission grossly disregarded the traditional standards of rate-making laid down by this Court and expressly recognized to be governing both in the Senate and in the House.

C.

THE COMMISSION ARBITRARILY DISREGARDED ITS FINDINGS THAT THE RATE OF RETURN OF WESTERN RAILROADS, DESPITE THEIR HIGHER RATE LEVEL, HAS CONSISTENTLY AVERAGED LESS THAN THE RATE OF RETURN IN ALL OTHER PARTS OF THE NATION.

The disastrously unfavorable earning experience of the Western railroads despite the higher rate level prevailing in the Western territory is recorded in the proceedings by the Commission under Section 77 of the Bankruptcy Act and in the recent bankruptcy and receivership proceedings in the courts.[1] The higher rates paid by the shippers on Western railroads have not been sufficient to cover the high unit costs of providing transportation service in the Western rate territory. The true, actual costs have been borne in substantial part by those whose funds have been invested in the properties.

The Commission found that the rate of return on the investment in Western railroads has averaged below the rate of return in all other parts of the country. Since the Western freight rates have always been higher than in the East, the sole reason for the low rate of return in the West is that the difference in rates has not been sufficient to cover the difference in costs between the East and the West. The Commission made no finding, and could not have found, that the Western rate of return for the past has been either excessive

[1] The list of Western railroads recently in bankruptcy or receivership is too long for a footnote. It may be found in Appendix C, this brief, page 193.

or adequate, and made no forecast that in the peacetime years of the future it would be excessive or would be even adequate. Its findings establish that only in an abnormal year and under war conditions, have the Western railroads been able to show a rate of return as high as the railroads in the rest of the country, *even with the help of the higher rate level in the West.* It is established by those findings that the Western railroads would have operated at *deficits* if their rate level had been uniform with the Eastern railroads. Upon those findings, the Commission's action in ordering the Western railroads to reduce their class rates to match the rates that were found to be just and reasonable for the Eastern railroads was arbitrary.

The Commission's findings and the evidence show the comparative rates of return for the years 1936 to 1943, inclusive, and for the years 1921 to 1935 inclusive. The following table starkly demonstrates the impact of high transportation costs upon the Western railroads. The Western rates were at all times substantially higher than the Eastern rates, but the Western costs more than absorbed the difference in rates.

AVERAGE RATES OF RETURN IN PERCENTAGES.

Year	Eastern Class Rate Territory Other Than Pocahontas[1]	Pocahontas	Western
1921-1941	3.14%	•	2.64%
1921-1943	3.27	•	2.91
1930-1939	2.12	•	1.59
1936-1941	2.47	6.25	1.97
1936-1942	2.82	6.10	2.53
1936-1943	3.01	5.99	2.89

The results for 1936 to 1943 (despite the higher level of rates in the West) were as follows:

[1] Report, R. 228; other averages computed from data in record; first three averages for Pocahontas not available in record.

RATES OF RETURN 1936-1943.

Year	Eastern Class Rate Territory		Southern	Western
	Other than Pocahontas	Pocahontas		
1936	2.67%	7.58%	2.52%	1.88%
1937	2.27	6.61	2.35	1.71
1938	1.26	4.54	1.90	1.09
1939	2.34	5.89	2.50	1.65
1940	2.66	6.21	2.57	2.06
1941	3.62	6.67	4.24	3.36
1942	4.90	5.29	6.51	5.80
1943	4.32	5.22	5.73	5.22

Report, R. 259.

The results for the years 1921 to 1935 were as follows:

RATES OF RETURN, 1921-1935.

Year	Eastern Other Than Pocahontas	Southern	Western	Percentage Western Under (—) or Over (+) Eastern
1921	2.70	2.02	3.01	+11.48
1922	3.35	4.23	3.39	+ 1.19
1923	4.60	4.73	3.78	—17.83
1924	4.28	5.01	3.74	—12.62
1925	4.90	5.63	4.01	—18.16
1926	5.16	5.19	4.30	—16.67
1927	4.40	4.24	3.79	—13.86
1928	4.82	4.08	4.26	—11.62
1929	5.05	4.01	4.41	—12.67
1930	3.27	2.66	3.07	— 6.12
1931	1.89	1.34	1.91	+ 1.06
1932	1.46	0.79	0.77	—47.26
1933	1.97	1.85	1.23	—37.56
1934	1.91	1.71	1.26	—34.03
1935	2.17	1.56	1.32	—39.17
Weighted Annual Average[1]	**3.42**	**3.23**	**2.90**	**—15.21**

[1] Ex. 66, Sec. II, Page 9, R. 7619; offered at R. 2219; weighted annual average computed from data therein. Data for Pocahontas region of Eastern class rate territory not available for the years prior to 1936. As shown in tables above, the rate of return for later years in Pocahontas is higher than in the rest of Eastern Territory.

In two of the twenty-three years shown in the record, the returns were almost identical. *In eighteen of the other twenty-one years, the Western railroads failed, by substantial margins, to earn a rate of return as large as the Eastern rate of return.*[1] In years of general prosperity and depression alike, the high Western costs have more than absorbed the rate differential. Even in 1941, with its large increase in war traffic which, as the Commission pointed out, was greater in the West than in the East, the Western railroads earned less than did the Eastern roads. It took the war in the Pacific and the closing of the Panama Canal to commercial shipping to permit the higher Western rates to raise the Western rate of return slightly above the rate of return that the Eastern railroads were able to earn on their lower rates.

The fact that the Western railroads have been able to earn any return on value in the face of their high costs of operation has been due to their relatively higher rate level, although, as the results show, that rate differential has been sufficient to compensate only for a part of the higher costs. If the rate differential had been sacrificed to the principle of national uniformity of rates, and the Western railroads had been required to reduce their rates to the Eastern

[1] Referring to the recent decision of the Commission in *Ex Parte No. 162, Increased Railway Rates, Fares and Charges, 1946*, this Court has stated as follows:

"While the reports of the Commission deal with the national railroad situation rather than with individual roads, an examination of them does not indicate that the Commission intended to supply by means of the increase in rates a net railway operating income sufficient to give a rate of return on invested capital substantially higher than for normal pre-war years. 264 I. C. C. 695, 722, 728; I. C. C., *Ex parte No. 162*, December 5, 1946, mimeographed report, p. 7." *Insurance Group Committee* v. *Denver and Rio Grande Western R. Co.*, 15 U. S. Law Week 4189, 4191, fn. 5 (Feb. 3, 1947).

level, the Commission's findings show that the Western railroads would have transformed their net railway operating income in the test year, 1939, into an operating *deficit* of $5,154,703. (See page 29, *supra*.) The amount of the losses of the Western railroads in the other years if such uniformity had been required may be indicated approximately from the following table. This table shows the amount by which the Western revenues would have been reduced if the rate differential of 16.6% (as measured by the Commission in the test year 1939) had been abolished and the Western railroads had been forced to carry their traffic at Eastern rates.

Year	Actual Western Net Railway Operating Income[1]	Reduction in Revenues if Western Rates Had Been on Eastern Level[2]	Adjusted Western Net Railway Operating Income or Deficit if Rates Had Been on Eastern Level
1936	$200,976,806	$183,283,164	$ 17,693,642
1937	182,981,252	191,823,858	(def) 8,842,606
1938	117,543,553	169,860,798	(def) 52,317,245
1939	178,115,556	183,650,609	(def) 5,535,053
1940	224,169,895	195,172,191	28,997,704
1941	370,938,129	247,719,132	123,218,997
1942	655,220,805	355,761,040	299,459,765
1943	602,657,057	427,199,479	175,457,578
1944	487,758,925	449,832,205	37,926,720
1945	392,377,407	440,956,758	(def) 48,579,351
Average 1936-1945	$341,273,939	$284,525,924	$56,748,015

The Western railroads, which suffered bankruptcy even on the relatively higher rates established by the Commission

[1] From the Commission's Statistics of Railways (Annual Reports) except 1945 which is from the Commission's Preliminary Abstract.

[2] Western-Eastern differential in levels applied to actual Western gross freight revenues shown in Commission's annual Commodity Statistics.

through the years, could not have continued to render their public service if they had been forced to operate on the Eastern rates. To conclude, in the teeth of such findings and evidence, that the Western rates are unlawful because they are higher than rates which are just and reasonable for the Eastern railroads, is, we submit, so irrational and arbitrary as to constitute a denial of due process.

D.

THE FINDINGS AND EVIDENCE CONCERNING THE MOVEMENT ON THE CLASS RATES DO NOT SUPPORT THE COMMISSION'S ORDER.

Repeatedly, in the reports, the Commission refers to the movement of traffic on class rates. (See for example, Report, R. 179-180, 310.) Its point is not that the freight does not actually move freely and in great volume, but is that both the Commission itself and the railroads historically have provided specific rates for the movement of most kinds of freight, which, the Commission stated, "are usually designed to fit the special conditions relating to the transportation of a single commodity or group of commodities"—and that this has reduced the movement on the class rates. (Report, R. 177.) These specific rates, which are made with special attention to the movement of the particular articles and to traffic conditions, consist of so-called "commodity" rates, and "exception" rates. The vast bulk of traffic in all parts of the country has moved for many years on such commodity or exeeption rates.[1]

[1] The following statements of Chairman Aitchison at the hearings in this proceeding are of interest in this connection.

"Chairman Aitchison: Well now, that gets right down to something that is very fundamental, as to which you may have a view. I was brought up, I might say, as a matter of elementary transportation economics, to regard a commodity rate as the normal rate on carload traffic, and the classification as intended only to take care of situations

The Commission found that

> "From the standpoint of the volume of traffic transported, class rates are the least important of the different kinds of rates. The great preponderance of traffic within and between the several territories is transported on commodity rates. The relative proportion of traffic transported at class or other rates has fluctuated from time to time, but *the volume of traffic, particularly carload traffic on which class rates have applied has been substantially less for many years than that on which exception rates have applied.*" (Report, R. 179.)

The Commission now purports to use this historical fact as a justification of its order for uniform rates, on the principle that too great a percentage of the traffic in all parts of the country, except in the East, moves on such rates and that the percentage of traffic moving on the class rates, except in the East, should be increased.

As that principle was applied here it is a novel and arbitrary theory of rate making. The Commission made no finding as to what would be a "proper" percentage moving on class rates, and none can be inferred from the rate changes which it prescribes. There is no evidence in the record upon which any such finding of the "proper" percentage could be supported and the actual order increasing some rates and reducing others, does not comport with any of the Commission's findings as to the movement on the class rates.

As to the less-than-carload traffic in Western territory, the record shows that 55.7% of that traffic moves on the class rates. (Computed from A. A. R. Merchandise Report,

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which were not important enough to warrant a commodity rate." (R. 3283.)

"Chairman Aitchison: I say, it gets right back to what I stated before. It was our understanding out West that the commodity rates moved the great bulk of the traffic, and it was only the unusual thing that took the classification, such as your blacksmith's coal, or your silver ore, and so forth." (R. 3286-3287.)

R. 11922, *et seq.*; see also Report, R. 184.) The Commission ordered a reduction in these rates, notwithstanding that high percentage, either on the theory that such a percentage was not high enough, or on the theory, which is more probable, that the Commission's purpose to establish national uniformity of rates was so fixed, that it was immaterial whether a high or a low percentage moved on those rates.

With regard to the carload traffic, the Commission made a rough study for a single day, September 23, 1942, which showed the following percentages of movements in class rates:

Territories (within or from one to another)	Percent of Carloads moving on: Class rates	Exception rates	Commodity rates
Official	5.8	17.6	76.7
Southern	1.8	6.0	92.2
Western trunk line	.6	.2	99.2
Southwestern	2.4	4.4	93.2
Official to Southern	12.6	36.3	51.1
Southern to Official	.9	4.9	94.2
Official to Western trunk-line	12.3	35.4	52.3
Western trunk line to Official	3.1	1.0	95.9
Official to Southwestern	22.5	52.0	25.5
Southwestern to Official	1.5	3.4	95.9
Southern to Western trunk-line	1.5	13.5	85.0
Western trunk-line to Southern	6.1	3.1	90.8
Southern to Southwestern	6.1	22.1	71.8
Southwestern to Southern	1.2	4.3	94.5
Western trunk line to Southwestern	13.0	6.2	80.8
Southwestern to Western trunk-line	2.0	3.0	95.0

(Report, R. 179.)

The Commission frequently cited the foregoing table as justifying its order. It is therefore important to observe the complete lack of correlation between these percentages

and the changes prescribed by the order. The following table, which is a rearrangement of the several classes of traffic in the order of the respective percentages, shows the foregoing data as compared with the effect of the order:

Territories (within or from one to another)	Percent on class rates	Effect of order on class rates
Western (less-than-carload)	55.7	Reduced
Official to Southwestern	22.5	Reduced
Western trunk-line to Southwestern	13.0	Reduced
Official to Western trunk-line	12.3	Reduced
Official to Southern	12.6	Reduced
Western trunk-line to Southern	6.1	Reduced
Southern to Southwestern	6.1	Reduced
Official	**5.8**	**Increased**
Western trunk-line to Official	3.1	Reduced
Southwestern	2.4	Reduced
Southwestern to Western trunk-line	2.0	Reduced
Southern	1.8	Reduced
Southwestern to Official	1.5	Reduced
Southern to Western trunk-line	1.5	Reduced
Southwestern to Southern	1.2	Reduced
Southern to Official	.9	Reduced
Western trunk-line	.6	Reduced

This table demonstrates the lack of substance in the Commission's reasoning about the percentage of traffic that moves on class rates as compared with the percentage for which the Commission and the railroads have established commodity or exception rates. If the Commission had actually believed that such percentages required that the rates be changed, it would have reduced only those rates on which a small percentage of traffic moves. It would have left unchanged, or would have increased, the rates on which a large percentage moves. But the foregoing table shows the Commission's total disregard for any such factors in its holding that the rates in all the territories should be made equal, mile for mile. That order would accomplish uniformity but it would do it by *reducing* all the class rates on which a high percentage of the traffic

moves and *increasing* the class rates in the East on which only 5.8% of the traffic moves.

Finally, it should be understood that despite all the language in the Commission's reports to the effect that it was basing its decision as to Western rates on the propriety of increasing the volume that moves on class rates and decreasing the volume that moves on exception and commodity rates, the Commission in its supplemental report denied the petition of the Southwestern Steering Committee to amend the order so that the class rates would replace the exception and the commodity rates wherever the latter are higher than the class rates. (R. 453.) And it amended its order to protect against the possibility of the new class rates being used by shippers in lieu of commodity and exception rates that would, under the order, become higher than the class rates. (R. 455, 456.) That modification was necessary to protect against the drastic disruptions of rate relationships that would otherwise have been caused, but necessarily the effect is to maintain the percentages moving on the various rates just as they were before. Uniformity of class rates was to be "brought about" by the decision, but this alleged reason for bringing it about (*i. e.*, to affect the percentage of traffic moving on class rates) was abandoned. The evidence on which the Commission thus relies impeaches its action.

E.

THE FINDINGS OF THE COMMISSION AS TO CONSIST OF TRAFFIC DO NOT SUPPORT THE ORDER BUT DEMONSTRATE THAT THE CONSIST IN THE WEST IS THE MOST UNFAVORABLE IN THE COUNTRY.

The Commission found that a much greater percentage of the total traffic on the Western railroads consists of articles which produce little revenue above the costs of their carriage than is true of the Eastern railroads. This factor of consist of traffic is highly important because of the fact that the revenue needs of a railroad or of

geographical group of railroads must be supplied by the particular kinds of traffic transported by them. The Eastern railroads have a much heavier percentage of freight of a kind that produces excess revenue to carry the general expenses. The Western railroads, in contrast, have a heavier percentage of products of agriculture, livestock and products of forests than do the Eastern roads. Such products contribute little over the costs of their own carriage. The Western railroads are therefore required, to a much greater degree than the Eastern railroads, to rely upon their manufactures and miscellaneous products (including class rate traffic) for their general revenue needs.

The Commission's report shows that it recognized the importance of these principles but it arbitrarily disregarded them when it issued its order requiring uniform rates without regard to the territorial differences. The Commission stated:

> "The problem is primarily one of providing adequate revenues for the carriers from the traffic which they transport. It is, therefore, the revenue-producing qualities, or rate-bearing characteristics, of the commodities which compose the commerce of these territories that constitute the governing factor in this situation." (Report, R. 309.)

We shall show, from the Commission's findings themselves, that the problem of the Western railroads with respect to obtaining revenues from the class rate traffic, as well as from the other traffic of "manufactures and miscellaneous" articles, is much more acute than is the case with the Eastern roads. The marked dissimilarities in consist of traffic and other transportation conditions are described in the following quotation from the Commission's report:

> "*The western district, which includes both western trunk-line and southwestern territories, as well as mountain-Pacific territory, is distinguished from official*

territory by dissimilarities in the composition of traffic, in the volume of business, and by other factors. As most railroad statistics are compiled by districts or regions into which the country has been divided for statistical purposes instead of by rate territories, the data are available only for these districts or regions.

"In 1941 the western-district class I railroads operated an average of 129,906 miles of road in freight service. This was 56.45 percent of the 230,094 miles operated in the entire country. The western roads originated 36.98 percent of the total tons of carload traffic originated in the United States, excluding the Pocahontas region. The eastern district roads operated 56,377 miles, or 24.50 percent of the total mileage, but they originated 47.40 percent of the total carload traffic originated, excluding the Pocahontas region.

"*When the composition of traffic originated in the two districts is analyzed, the contrast becomes greater.* In comparing traffic data, the figures used are based on those for the year 1941 from which, however, the figures for the Pocahontas region are excluded because the railroads of that region originate an extraordinarily large tonnage of coal. In that year the western district originated 68.82 percent of the total agricultural products originated in the country, as compared with 20.88 percent originated by carriers in the eastern district. This volume of products of agriculture originated in the West was but 6.33 percent of the total of all carload traffic originated in the country.

"In the same year the western roads originated 28.06 percent of manufactures and miscellaneous tonnage as compared with 60.66 percent originated by the eastern carriers. A striking contrast in the character of traffic is shown by the fact that the western district railroads originated 68.82 percent of the total tonnage of products of agriculture while the eastern railroads originated 60.66 percent of the total tonnage of manufactures and miscellaneous. While the difference in these figures is only 8 percentage points, the eastern roads' tonnage of manufactures and mis-

cellaneous is almost three times the tonnage of products of agriculture originated by the western district railroads. *The eastern roads' preponderance of high-grade traffic affords a greater source of revenue to them than do the products of agriculture to the western carriers.*

"In 1941 the western roads originated 63.03 percent of the total tons of animals and products originated in the country, excluding the Pocahontas region, as compared with 28.51 percent originated by eastern roads. While the western roads' percentage is high, the tonnage which it represents was less than 1 percent of the total tons of carload traffic originated in the United States. We have stated (*Livestock-Western District Rates,* 176 I. C. C. 1, 83) that *livestock is a commodity which from its nature cannot be expected to do more than pay its own way. In other words, it cannot sustain a rate level which will produce more than the cost of rendering the service plus a minimum of profit.*

"The western district roads in 1941 originated 58.73 percent of the total tons of products of forests originated in the country as compared with 7.52 percent originated by the eastern roads. The western tonnage is 3.80 percent of such total. *This group of commodities is subject to freight rates which are outside of the higher brackets.*

"In 1941 the western roads originated 33.31 percent of the total tons of products of mines as compared with 49.85 percent originated by the eastern roads. The origination in the West was 17.47 percent of the total originated in the country as compared with 26.14 percent for the eastern district. The figures for the West include iron ore, which is mined almost solely in Minnesota and is hauled for relatively short distances to Lake Superior docks." (Report, R. 290, 291.)

The foregoing statements are reinforced in factual findings of the Commission elsewhere in the reports. The Commission set out a table showing the consist of traffic in the several territories, as divided into the groupings

required by the Commission. In that table, the Commission found (as is generally known) that the Western railroads carry a much larger percentage of products of agriculture, animals and products, and products of forests than do the railroads in either the East or the South. In contrast, the Western railroads transport a much *smaller* percentage of products of mines than do the Eastern or Southern railroads. (Report, R. 226.) The following table summarizes these findings:

Commodity Groups	East (including Pocahontas) Percent of Tonnage	West Percent of Tonnage	South Percent of Tonnage
Products of Agriculture Animals and Products Products of Forests	9.97	32.47	23.65
Products of Mines Manufactures & Miscellaneous	88.42	66.02	73.60
Less-than-carload	1.61	1.51	2.75
	100.00	100.00	100.00

The significance of these findings lies in the further findings of the Commission that "the classes of commodities which contribute most in excess of out-of-pocket cost are products of mines and manufactures and miscellaneous." (Report, R. 227.) These are the articles which are carried in heaviest proportion by the Eastern railroads (88.42%), as contrasted with the much smaller proportion of such articles on the Western railroads (66.02%).

In contrast to the excess revenue on such articles, the Commission found that livestock "cannot sustain a rate level which will produce more than the cost of rendering the service plus a minimum of profit." (Report, R. 291.) It further found that the group of products of forests "is

subject to freight rates which are outside of the higher brackets." (Report, R. 291.) As for the products of agriculture, it is well known that the Commission has for many years prescribed rates on such products at the lowest possible level, in relation to other traffic.[1] The Commission so found in this proceeding. (Report, R. 291.) These low rated articles are the ones which are carried in the greatest proportion by the Western railroads (32.47%) as compared with the Eastern railroads (9.97%). The Western roads are required to look to their smaller proportion of high rate traffic to carry the general expenses.

The vital importance of the territorial differences in the character of railroad freight traffic was emphasized by the Commission itself in its letter of February 8, 1939, to Congress, signed for the Commission by the late Commissioner Joseph B. Eastman. In that letter the Commission, as then constituted, successfully opposed the inclusion in the Transportation Act of 1940 of legislation directed toward the establishment of uniform rates in the several rate territories. The Commission there stated, *inter alia:*

> "(5) In considering the objective of a 'reasonably uniform national system of freight rates' proposed in S. 126 and 137, it should be borne in mind that the character of railroad freight traffic differs widely in the various sections of the country, dependent on the character of their industrial activities. Freight rates normally reflect these differences. A particular kind of traffic, such as grain, livestock, or petroleum, may move in large volume and be given relatively low rates in a territory where freight rates are in general relatively high. There are also many important dif-

[1] The Commission has been directed by Congress to set rates on agricultural products "including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: * * *" Hoch-Smith Resolution, 43 Stat. 801, 49 U. S. C. Sec. 55.

> ferences in competitive and transportation conditions. While the freight-rate structure of the country has many seeming inconsistencies, it is, after all, largely the product of evolution and adjustment to practical conditions, and any attempt to recast it abruptly into a radically different form, in disregard of such conditions, is likely to have results more disturbing than beneficial.'"[1]

When Congress came to consider the bill that was enacted as the Transportation Act of 1940, it was made plain that it recognized the low rates on agricultural products in the West and intended to preserve the variances in the territorial rate structures which are adapted to these substantial differences in the territorial consist of traffic. Senator Frazier of North Dakota expressed the fears that the legislation might be interpreted as authorizing the establishment of national uniform rates in disregard of the territorial conditions which have produced relatively low agricultural rates in the West. Those fears, by the action of the Commission here, have been proved to be justified. We ask the Court to contrast the following assurance by Senator Wheeler with the action here ordered.

> "Mr. Frazier. We have a much lower rate [on wheat] than prevails in many other sections of the country. If rates are to be equalized, it will mean raising our rates.
>
> "Mr. Wheeler. *The bill does not mean that rates are to be equalized.*" (Cong. Rec., Vol. 84. Part 6, p. 5890.)

We submit that the Commission's total disregard of its

[1] See Vol. I., Omnibus Transportation Bill, Hearings before the Committee on Interstate and Foreign Commerce, H. of R., 76th Cong., 1st Sess. on H.R. 2531, pp. 717-719. Other parts of the letter are set out in the discussion of the legislative history of the Transportation Act of 1940, *infra*, pages 135-136.

own basic findings of the fundamental differences in territorial consist of traffic, and its insistence on the establishment of equal rates despite the territorial differences, is wholly unauthorized by Congress and is arbitrary.

F.

BY THE LAWFUL STANDARDS OF RATE-MAKING, THE SOCIAL AND ECONOMIC DATA IN THE REPORTS AND IN THE EVIDENCE IMPEACH RATHER THAN SUPPORT THE ORDER.

In the foregoing portions of the brief we have discussed the Commission's findings and the evidence establishing that the Western railroads' costs are much higher than the costs of the Eastern or Southern railroads, that the prescribed rates would be below the Western costs on less-than-carload traffic, that the Western density of traffic is only a third of that in the East, that the consist of the traffic in the West is the most unfavorable in the country due to the high proportion of agricultural products which are accorded the "lowest possible lawful rates," and that, despite a generally higher rate level, the Western railroads, except in the war years, have earned by far the lowest rate of return in the country. On the basis of the standards of lawfulness long recognized by this Court and by the Commission, those facts impeach the decision which would now condemn the class rates in the West because they are not identical mile for mile with the rates in the East.

We turn now to the social and economic data to which the Commission devoted so much of its attention and upon which the Government has relied for support of the decision. Briefly, the part of that data which is particularly relied upon is the part that shows Eastern territory to have the heaviest density of population and the most manufacturing in the country and the largest per capita

income. The social and economic motivations of the decision simply do not fit into the framework of the tests of lawfulness of rates hitherto recognized by Congress, by this Court and, with but rare exceptions, by the Commission itself. In fact, as we shall show, the very data which are said to support the decision are data which, by the customary rate-making standards, lead directly to the conclusion that it is unjust, unreasonable and arbitrary to require the Western railroads to reduce their rates for the purpose of equalizing them, mile for mile, with the rates in the concentrated and industrialized East.

The problem is not only basic to this case but is of the utmost importance and significance for the future of American railroads, industry and agriculture. It was exactly and concisely defined during the pendency of this proceeding in the following statement by Chairman Clyde B. Aitchison, who presided at the hearings:

> "This leads to what is the final question to be posed, and is the most far-reaching of them all. Shall future transportation charges be based upon the transportation conditions involved, as in the past, or shall the Government frankly make use of its power to regulate or prescribe transportation charges as one of the means whereby it effectuates desired social or economic results, such as the diffusion of industry or of population, or the more rapid or uniform development of a particular section of the country?"[1]

The majority of the Commission, including Chairman Aitchison, adopted the novel latter course, as is apparent from a reading of the report and consideration of the findings of traffic and transportation differences between the East and the West.

The minority members deplored this abandonment of the

[1] Aitchison, "After the War Is Over—Transportation Problems", I. C. C. Practitioners' Journal, May, 1944, Vol. XI, pp. 743, 747.

rate-making standards. Commissioner Mahaffie stated, in part, as follows:

> "In a country so vast as this with its widely varied resources and differing transportation needs it seems to me a mistake to try to compel general equality in rates except to the extent equality is justified by transportation conditions. I think the effort to do so must necessarily fail. But I am afraid the process of finding out whether it can be done will be painful and costly. The prejudice findings on which the new adjustment is largely predicated are calculated, if carried to a logical conclusion, to lead to a rigid rate structure based on mileage. While this may seem on its face to be equitable its accomplishment would entail radical industrial and agricultural readjustments. I doubt if the country should be required to incur the expense of making them." (Report, R. 323.)

Commissioner Patterson also strongly objected to the decision to disregard territorial transportation conditions and stated:

> "I do not subscribe to the 'Ultimate Findings' of the majority. * * * Orderly procedure requires, as the first step, the working out of uniform classification ratings. After this is done there should be a revision of the class rates for application in connection with the revised ratings, which should be on such a level as to move a substantially greater volume of traffic than do the present class rates, and which also should have due regard for differences in transportation conditions, the consist of the traffic, and the revenue needs of the carriers, in the different sections of the country." (Report, R. 324.)

Commissioner Porter stated that the class-rate uniformity called for by the findings of the majority is "without adequate support upon the record and [would] ignore the standards of rate-making consistently followed by this Commission throughout its 58-year history * * *." (Report, R. 324.) He further stated that the findings in the

majority report "set aside long-established principles of rate making under which this country has become great and has developed the most efficient transportation system in the world" and that the majority findings "'attempt to equalize fortune, opportunities, and abilities,' which, as the Supreme Court pointed out in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, is contrary to the purposes of the Interstate Commerce Act." (Report, R. 340.)

And Commissioner Barnard concluded his dissenting opinion as follows:

> "However desirable a uniform system of class rates may be, if in order to accomplish that uniformity it becomes necessary to disrupt the existing rate structures without sufficient evidence as to the propriety of such uniformity, and without the rates involved having been condemned, the end does not justify the means employed, and such action cannot have my support." (Report, R. 344.)

The tremendous new power to remake the economy of the entire country, asserted for the first time by the majority of the Commission in this case, was defended by the Government in the District Court on the sweeping ground that the Commission has "the power to bring about a step by step equalization of all the rate levels on a national basis, starting with class rates, as the Commission has done in these proceedings, and reserving exception and commodity rates for later consideration." (Brief for the United States, p. 134.) The Government further acknowledged that this is "the principle on which the Commission is working," although "The rate structure of the United States cannot be remade in a day * * *." (*Id.*, p. 135.) The Government frankly defended the wisdom of the Commission's order on the following ground: "Specialization of the South and West in these pursuits [agriculture

and production of raw materials] subjects the people of this area to economic deficiencies and dislocations. By establishing industries in the South and West, economic wastes could be avoided, one of which is caused by excessive congestion in the great urban industrial communities of Official Territory, far from most of the raw materials sources." (*Id.*, p. 96.)

The District Court, after studying the report and evidence and hearing arguments, found that the ultimate object of the order was the dislocation of industry from Eastern (or Official) Territory and its establishment in the other territories. But the Court then went on to abnegate any judicial responsibility in these circumstances on the ground that this "relates to matters of legislative policy" which, the Court thought, had been delegated by Congress to the Commission. The Court stated its views of the total lack of judicial cognizance, as follows:

> "It has been earnestly argued that the investigations and order under review are the result of political agitation having for its ultimate object the dislocation of industry from Official territory and its establishment in the other territories, principally in the Southern, and that does appear plausible. Yet such a question is not within the bounds of judicial cognizance but relates to matters of legislative policy. Whether such policy is wise or the opposite is not for us to determine. We can only be concerned with decision as to whether or not the Commission's action was within its power properly exercised under statutory authority which does not go beyond Constitutional limitations. *Chicago, B. & Q. R. R.* v. *McGuire*, 219 U. S. 549; *Rochester Telephone Corp.* v. *United States, supra.*" (R. 1436-1437.)

We respectfully submit that this is grievous error of most far-reaching consequences. We do not ask this Court nor did we ask the District Court, to determine whether it is a wise or an unwise policy to relocate industry, to

diffuse and to redistribute the population, to remove people from the farms of the West and to place them in the assembly lines of the cities. But we do earnestly contend that the determination of the wisdom of such overwhelmingly important policy matters has never been delegated by the Congress to the Interstate Commerce Commission, and that the District Court was wrong in holding that the Commission is now vested with such powers under statutory authority.

The Interstate Commerce Act, as amended, and its legislative history, which we shall discuss in a later section of this brief, prove that Congress has not revoked the recognized rate-making standards. And, under those established standards, the economic and social data in this proceeding not only fail to support the order but, instead, constitute the fundamental economic reason for the higher transportation costs of the Western railroads and for their relatively unfavorable consist of traffic.

The Commission referred in its "General Conclusions and Ultimate Findings" to the evidence that it had considered in reaching its conclusion. It stated, in part, as follows:

> "Studies and analyses have also been made of the natural resources of the areas concerned and of the growth and development of these areas in terms of agricultural, forest, and mineral production, manufacturing, and distribution of population. Other analyses have dealt with the composition and movement of traffic and with employment, labor, and income." (Report, R. 303.)

The sociological and economic data most heavily relied upon in support of the order are concerned with the density of population in the several territories, the extent and location of manufacturing and the income per capita. We shall therefore discuss these portions of the data first,

and shall then consider the findings which show the distinct advantages of the East in natural resources and location.

Population—The Commission found that about half the population of the country (48.7%) lives in Official Territory, whereas in Western Trunk Line and Southwestern Territories the percentages are 13.5 percent and 9.9 percent, respectively. (Report, R. 162.) The population of every territory has increased since 1900, but the percentage of total population has increased only in Southwestern and Mountain Pacific Territory. The percentages of total gainful workers are substantially in the same proportions as the percentages of total population. There has been no material change in the distribution of either the population or the gainful workers since the Commission established the class rates which it now holds to be unlawfully discriminatory.

With regard to the population of Western Trunk Line Territory, the Commission found that "much of the territory is sparsely settled, and all is largely agricultural, facts well known and borne out by United States census data." (Report, R. 266-267.) The rural population is 55.7 percent of the total population. The Commission's report shows the comparison between the differences in population and the effects upon the railroads in the following table (Report, R. 277):

	Western Trunk Line Territory			
Population (1940)	Zone I	Zone II	Zone III	Central Territory[1]
Total (thousand)	7,264	5,015	2,008	24,070
Per square mile	43	28	9	149
Per mile of railroad	313	280	203	749

[1] Central Territory is the subterritory of Eastern Territory that is closest to Western Trunk Line Territory and which consists of Ohio, Indiana, Illinois, lower Michigan and the southeastern counties of Wisconsin.

It will be seen that the sparse population in Western Trunk Line Territory puts an extraordinarily heavy burden upon the railroads in that territory as compared with those in the East. The relative handicap of the Western railroads is in fact greater than is here shown, since the population density east of Ohio is, of course, greater than in the central part of Eastern Territory. Each mile of railroad in the East has approximately three times as many people to support it as compared with the West. By the standards of rate-making hitherto established, such data furnish no support for identical rates but show, instead, why rates must be higher in the West if adequate service is to be provided.

The other way of viewing these figures, and the view taken by the Commission, is to say that in some way the populations should be redistributed and that as a matter of legislative policy the Government should bring about that redistribution. With regard to the population data and other arguments submitted by Southwestern Territory interests, the Commission stated that "much reliance is placed on the testimony of the witness for the Tennessee Valley Authority, which dealt principally with economic questions * * *." (Report, R. 279.) The witness, Mr. A. D. Spotswood, who admitted that he was not qualified to speak with regard to rates (R. 2422) made the following statements, in part:

> "That brings me to my second main proposition. For a number of years our national economy has been out of balance, in that the proportion of the people employed in the production of staple agricultural commodities and other raw materials is greater than is necessary to serve the people's needs. (R. 2368.)
>
> "Most of my remarks on the question of readjusting the national economy to a more useful and more productive basis will therefore be pointed to agriculture. (R. 2372.)

"In drawing the conclusion that there is a considerable national need to shift resources and energies away from the raw materials occupations into other occupations, I am stating a principle that is accepted by most students of the national economy. (R. 2371.)

"It is evident, then, that it is sound public policy to clear the way so that large numbers of persons, especially in the South and West, where pressure of population on farm land is greatest, can move out of agriculture into other occupations." (R. 2373.)

Although Witness Spotswood advocated the proposed equalization of class rates for the admitted and avowed purpose of shifting the populations and occupations of the people in the West and South, he conceded that he had paid no attention whatever to the economic effect of the proposed equalization of class rates upon the railroads involved. He testified as follows:

Q. "You have not studied the economic effect of any rate change on the railroads in either territory; that is correct, is it not?

A. "Because I did not have the material with which to study.

Q. "The answer is 'No'?

A. "The answer is 'No.'" (R. 2417.)

The findings and evidence as to population do not lend any support to the proposition that transportation conditions are similar in the West and the East. That material was offered and relied upon as showing, instead, that it would be good policy to use the power to regulate freight rates as an instrument to shift populations from the farms into the towns and cities, to reduce the population density of the East and to reconstruct the economy of the country through the manipulation of freight rates in order to bring about that reconstruction.

Income—The Commission not only found that there are fewer people in the West per mile of land and per mile

of railroad as compared with the East, but also found that the people in the Western Trunk Line and Southwestern Territories have substantially less income per capita than do those in the East. Thus the unfavorable situation of the Western railroads is even more accentuated than appears from the bare comparisons of population. The Commission refers to the relative income data in its report but does not set it out in detail. However, table 6 of Exhibit 76 (R. 7972; offered at R. 2392) which was reproduced at page 94 of the Government's brief in the District Court, shows the following data for 1940:

Territory	Average Dollar Income Per Person Employed	Relative Income Level Per Person Employed
Official	$1,988.	118.
Southern	940.	56.
Southwestern	1,177.	70.
Western Trunk Line	1,411.	84.
Mountain Pacific	1,997.	118.

It will be seen that, except for Mountain Pacific Territory, which has the highest level of class rates in the country and also the highest per capita income, the income of the persons in the West is less than in the East. The handicap of the Western railroads in serving the territory in which they operate is therefore increased. Such data, we submit, cannot support a conclusion that it is lawful to force the Western roads to reduce their charges to the rate basis that is adequate and reasonable for railroads operating under the more favorable conditions in the East.

Manufacturing—The third major economic comparison that is relied upon by the Commission and the Government is with respect to manufacturing and the alleged economic desirability of reducing the percentage of manufacturing in the East and increasing it in other territories

through the device of reducing the rates on manufactured articles in the South and West and increasing such rates in the East. In 1939 the value of manufactured products in Official Territory was 67.8 percent of the country's total as compared with 14.4 percent in Western Trunk Line and Southwestern Territories combined. (Report, R. 161.) From 1899 to 1939 the proportions which come from Official Territory and Western Trunk Line Territory have been steadily decreasing, while the proportions from the other territories have been increasing both in dollar amount and in percentages.

The Commission found that:

> "As one proceeds from official territory westward into western trunk-line territory, manufacturing thins out." (Report, R. 267.)

One of the most significant reasons for this appears in the Commission's finding that Official Territory is the important source of the raw materials for use by manufacturers in Western Trunk Line Territory. The Commission stated:

> "Official-Illinois territories[1] are important sources from which western trunk-line territory manufacturers draw in large quantities many of their supplies of raw materials, semifinished materials, and parts." (Report, R. 267-268.)

Since, as the Commission found, the raw materials used by Western Trunk Line manufacturers come in large quantities from Official Territory, it is apparent that the farther away the factory is from Official Territory the more uneconomical it becomes to ship those materials for fabrication. This is especially so in connection with the thesis of the Commission and the Government in this case that every effort should be made to require lower rates

[1] "Official territory encompasses * * * Illinois territories * * *." (Report, R. 131.)

for use by the Western manufacturers in shipping the finished product back for sale in Official Territory. Moreover, as we shall show, the Commission found that the predominant natural sources of energy, both mineral and water power, are located in Official Territory. The proposed shift in populations and manufacturing from Official Territory westward would therefore involve the transportation of raw materials away from their sources and from the sources of energy in Official Territory, and the reshipment of the finished products back across the country for sale in the East.

The Commission further examined and made findings regarding the extent of manufacturing in the West as related to the number of miles of railroad and compared those findings with similar data for the East. The comparison demonstrates the great territorial differences and the very material traffic and transportation difficulties of the Western roads. The table is as follows (Report, R. 277):

	Western Trunk Line Territory			
Value of Manufactures 1939	Zone I	Zone II	Zone III	Central Territory
Total (million)	$2,146	$1,158	$246	$16,247
Per mile of railroad (thousand)	$ 92	$ 64	$ 24	$ 505

Clearly the fact that the value of manufactures produced in Western Trunk Line Territory per mile of line ranges only from $24,000 to $92,000 does not support the proposition that the Western railroads must therefore be required to reduce their rates to equality with Eastern railroads where the comparable value of manufactures is $505,000.

The findings and evidence on manufacturing, like those on population and income per capita, all point to the most significant and fundamental territorial differences in traffic

and transportation conditions and, on the lawful standards of rate-making, totally fail to support the order requiring the reduction of rates in the West to the level identical with those in the East.

Relative Natural Advantages—The other economic findings of the Commission disclose the natural advantages of Eastern Territory over the Western territories with respect to mineral products, energy resources, timber reserves and agricultural production.

The following material is summarized principally from the lengthy section of the Commission's report entitled "Distribution of Natural Resources and Economic Development of the Five Principal Freight Rate Territories." (Report, R. 151-163.)

Energy—Fabrication of raw materials into manufactured goods requires great quantities of energy. The Commission found that the heavy preponderance of the country's total natural resource of energy supply is located in Official Territory. It found that "coal remains the principal energy source," that energy derived from coal far exceeds the combined total from petroleum and natural gas and that "So far as reserves are concerned, coal represents practically 99 percent of the total heat value of the nonreplenishable mineral sources of energy." (Report, R. 153, 154.) Because of the vital importance of coal, it is of particular significance to note that the Commission, after reproducing a table showing the coal reserves, made the following finding:

> "The foregoing table shows very clearly the heavy preponderance of the total reserves of bituminous and semibituminous coal in official territory, this area possessing between 40 and 45 percent of the total for the United States or approximately as much as southern and mountain-Pacific territories combined. Also, official territory possesses a practical monopoly of the anthracite reserves." (Report, R. 154-155.)

The Commission further found that Official Territory has a much larger percentage of the total mineral fuel resources than any other territory except Mountain Pacific, which is not included in this case. (Report, R. 156.) Indeed, the Official Territory's proportion of these mineral fuel resources was found to be much larger than the *combined* proportions of Western Trunk Line and Southwestern Territories.

Similarly, the Commission found that Official Territory has more than three and one-half times as much potential water power as do the combined Western Trunk Line and Southwestern Territories. (Report, R. 156.) The productive capacity for such energy and the actual amounts of energy produced are in approximately the same proportion as this total potential energy. Official Territory has 35 percent of the total capacity of water wheels, in contrast to the 9 percent in the other two territories combined. Moreover, in 1937, 60 percent of all electric energy originated in Official Territory; only 14 percent originated in the two western territories.

Raw Materials and Minerals—As previously noted, the Commission found that the manufacturers in Western Trunk Line Territory draw their raw materials in large quantities from Official Territory. (Report, R. 267-268.)

For the year 1939, fully one-third (33.4%) of the country's total value of products of mineral industries came from Official Territory. This was more than the mineral products of any other territory in the country. Western Trunk Line Territory produced only 9 percent of the minerals, and Southwestern Territory 27.8 percent (principally petroleum). (Report, R. 153.)

With regard to the potential reserves for certain metals, Southwestern Territory has only 5 percent of the country's reserve of iron ore. (Report, R. 151.) Western Trunk Line

Territory has 36 percent (Report, R. 151), which is located in the Mesabi range of the border state of Minnesota (R. 2394) and which, by reason of the natural location of the iron ore and coal resources, is economically useable only in Official Territory. It is necessary to bring iron ore and coal together in order to produce iron and steel (R. 2394) and the coal for use with this iron ore is located in Official Territory. There is only a short railroad haul from the Mesabi range to the head of the Lakes, from which point the ore is transported by water to the iron and steel centers along the Lakes. (Report, R. 270-271.) The iron and steel centers which use this ore, of course, are located near the natural supplies of coal and therefore are in Official Territory.

More than 98 percent of the copper is located in Mountain-Pacific Territory, which is not involved here. Western Trunk Line and Southwestern Territories combined have only 1.3 percent of the copper reserve. (Report, R. 151.) About half of the potential lead reserves are located in Western Trunk Line Territory, but only 5.8 percent are in Southwestern Territory. Official Territory has 24 percent of the zinc reserves, as compared with 12.4 percent in Western Trunk Line Territory and 36.8 percent in Southwestern Territory. (Report, R. 152.)

The Commission found that the reserves of metallic minerals are not confined to ore and that there are "large reserves of these metals in the various finished products into which they enter." It found that "Official Territory greatly outranks all other territories in the proportion of semidurable and durable commodities which constitute the more important sources of the secondary metal supply." (Report, R. 152.)

Agriculture.—After having found that Official Territory is the important source of large quantities of the raw

materials used by western manufacturers, that it leads all territories in products of mineral industries, and has much more mineral fuel resources and more potential and actual waterpower resources than all of the combined Western Trunk Line and Southwestern Territories, the Commission turned to a consideration of agriculture. Here, again, it found that the East enjoys the most favorable position. It stated:

> "The highly industrialized character of official territory should not obscure the fact that it is at the same time an important agricultural area." (Report, R. 157.)

The Commission found that the *gross farm income from crops and livestock in Official Territory is the highest in the country,* and amounts to 31 percent of the total. Notwithstanding the fact that the land area of the Western Trunk Line and Southwestern Territories is approximately two and one-half times as great as that of Official Territory, (Report, R. 158) and the fact that the economies of the western territories are principally agricultural, the gross farm income in those territories was found to be only 26.5 percent and 11.4 percent, respectively, of the country's total. The findings as to "value of all farm products by freight-rate territories, 1899-1939," reflect substantially the same proportions. There, again, Official Territory leads the country.

Timber—The Commission stated that there were numerous tables in the record showing the distribution of forest resources among the freight rate territories, and reproduced what it found to be the "most significant" one. (Report, R. 160.) That table shows that Official Territory has much greater natural resources of standing saw timber than do either Western Trunk Line or Southwestern Territories and, in fact, (on the first of two alternative groupings shown) has more than the other two territories combined.

Miscellaneous Data—The Commission further found that Official Territory has:

60 to 62% of the manufacturing establishments;
44 to 46% of the hotel rooms;
59 to 61% of the business structures;
50 to 52% of the dwelling units;
48 to 50% of the motor vehicles;
56 to 58% of the miles of wire in cable;
64 to 66% of the miles of wire of telephone companies.
(Report, R. 152.)

Railway Mileage and Equipment—Because of the vast areas in the West, and despite the sparse population and low volume of traffic, the provision of railway service in Western Trunk Line and Southwestern Territories requires a far greater amount of railway mileage than in Official Territory. The Commission found that, in 1940, railway mileage in the two former territories was 90,981, in contrast to the 67,022 miles in Official Territory. (Report, R. 163.)

The high degree of utilization of this mileage in Official Territory in contrast to the unfavorable conditions in the West is shown by the finding that the class I railroads of the Eastern district own from 41 to 46 percent of all the steam locomotives and own more than half of all the steel and steel underframe passenger and freight-train cars. (Report, R. 152-153.)

Conclusions as to Effect of Economic Data.

The Commission found that the relatively small land area of the East contains disproportionately large shares of the country's natural resources. It concluded as follows:

> "The industrial development of the East is due to many factors other than transportation services and costs, such as climate, soil, natural resources, avail-

able water power, supplies of natural gas and coal, and early settlements of population which antedated the building of railroads." (Report, R. 234.)

Official Territory has the heavy preponderance of the natural resources of energy, both of mineral fuel and of water power. The Commission found that Official Territory is the important source of large quantities of many of the raw materials used by the western manufacturers, and that it produces more mineral products than either Western Trunk Line Territory or Southwestern Territory (three and one-half times as much as the former). It contains three times as much bituminous and semi-bituminous coal as do the other two territories combined, and has almost a complete natural monopoly of the anthracite coal. Its agricultural importance has often been obscured by its industrial activities, but the Commission found that, while the low rated products of agriculture constitute a much smaller proportion of the total tonnage handled by the Eastern roads, the East leads the West both in gross farm income and in the value of all farm products. It has approximately three times as much farm income and value of farm products as does the Southwestern Territory, although the land areas of those two territories are the same. It has more timber resources than either of these two territories (four times as much as Western Trunk Line). It was cleared first, settled first and industrialized first. It has ready access to water-borne shipping, both on the Atlantic Ocean and on the Lakes. With these combinations of unusually favorable natural resources, the highest level of agricultural production, short distances, high density of population and ready access to water-borne shipping and to the world trade routes, it is hardly surprising that the value of its products of manufacture is four times as much as in the other two territories. These factors constitute the natural advantages of Official Territory which the proponents of commercial equalization seek

to offset by setting freight rates on a basis not justified by traffic or transportation conditions.

By the recognized standards of rate-making it is apparent that the Commission's findings on this social and economic data establish the basic reasons why the railroad systems which serve the Western Trunk Line and Southwestern Territories and which must draw their revenues from those territories are under a heavy handicap compared with the railroads that serve the Eastern Territory, and why the rate level which would be adequate, *just and reasonable for the Eastern railroads* simply would not enable the Western railroads to serve the transportation needs of their territories. The data furnish no rational support for a conclusion that it is unlawful for the Western railroads under those conditions to charge higher rates than the Eastern railroads.

We submit that the standards of making rates according to transportation conditions have not been repealed and that the Commission has not been authorized by Congress to change rates or establish new rates for the purpose of "the diffusion of industry or of population" or for any other purpose of offsetting the natural advantages of one territory over another. From the very beginnings of the Interstate Commerce Act, both the Commission and the courts have emphasized that the Commission was not created to be the economic dictator of the country's industrial growth, and that Congress has not lodged with the Commission the authority to equalize commercial and economic conditions in the various parts of the country. In *Ashland Fire Brick Co. v. Southern Ry. Co.*, 22 I. C. C. 115, 121 (1911) the Commission said:

> "It seems unnecessary here to state that the power has not been lodged with this tribunal to equalize economic advantages, to place one market in competition with another, or to treat all railroads as a part of

one great whole, apportion to each a certain territory, or to require all to meet upon a common basis at all points."

This Court early laid down the principle that when the Commission leaves the regulation of rates and invades the legislative field of regulation of industrial activities, it is the responsibility and duty of the courts to set aside all orders founded upon such considerations. One of the most frequently quoted statements of this principle is that of Mr. Justice Holmes declaring for the Court in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46 (1911), that the Commission has no authority to "attempt to equalize fortune, opportunities or abilities."

In *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433 (1911), the Commission found that an increased rate on lumber in the Willamette Valley was unreasonable and ordered it reduced to a point slightly higher than the rate at which it had been maintained for several years. The carriers charged that the rate had been set aside by the Commission because the latter "deemed that it would be equitable to shippers in a particular district to put in force a reduced rate." (p. 443.) They contended "that although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law, the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power." (p. 443.) This Court unanimously concluded that the lower court had erred in failing to set aside the order "because it was made in consequence of the as-

sumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests." (p. 444.) The Court further stated:

> "While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole in the light of the condition of the record to which we have referred it clearly results that it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate which had prevailed for some time to a just and reasonable charge for the service rendered for the future. Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that the order was an exertion of a power not possessed to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary." (pp. 449-450.)

The language quoted immediately above is particularly apt in this case. Here, as there, the minority members of the Commission stated expressly that the majority were in fact asserting powers over the national economy which are not possessed by the Commission, and, in the words of this Court "no language was inserted in the opinion to indicate to the contrary."

Mr. Justice Brandeis, for the Court, stated in *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 524 (1924) as follows:

> "It is true that the law does not attempt to equalize opportunities among localities, *Interstate Commerce*

Commission v. *Diffenbaugh*, 222 U. S. 42, 46; and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference. *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 445. *To bring a difference in rates within the prohibition of § 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions.*" (p. 524.)

The Commission found any difference in rates between the East and the West to be discriminatory, holding the rates in the West to be unlawful precisely in the amount that they differ from rates found lawful for the East and South. In doing so, it disregarded the principle stated by this Court that "to bring a difference in rates within the prohibition of Section 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard." To refer, for example, to one of almost infinite differences in the transportation conditions established by this record, the difference in traffic density alone is such that many elements of expense which are shared by three tons of freight in the East must be borne by one ton in the West. Under these circumstances, to substitute uniform rates for the existing rates which were "measured by the transportation standard," is not to remove discrimination but to create it. It is the equivalent of a decree that a hotel guest must not be required to pay more for the single occupancy of a room in Oklahoma City than is paid by each of three guests who share a similar room in Toledo.

The principle of the foregoing cases was recognized and restated by this Court in *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627 (1933), in the following words:

"While the carriers may, therefore, meet competi-

tion by equalizing rates or maintaining differentials both to interior points and to ports, they may not adjust their rates with the motive of injuring or aiding a shipper, a particular kind of traffic, or a locality, for so to do is to depart from the transportation standard, conformity to which the Act contemplates, and substitute others which are prohibited. *A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful; and obviously, what the carrier may not lawfully do, the Commission may not compel.* *Southern Pac. Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 433, 444; *Interstate Commerce Comm'n* v. *Diffenbaugh*, 222 U. S. 42, 46; *Ellis* v. *Interstate Commerce Comm'n*, 237 U. S. 434, 445; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 524; *Atchison T. & S. F. Ry.* v. *Interstate Commerce Comm'n*, 190 Fed. 591; *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462, 471." (pp. 637-638.)

In one of the cases cited with approval by this Court, above, *Anchor Coal Co.* v. *United States*, 25 F. 2d 462 (D. C. W. Va. 1928) (dismissed as moot in 279 U. S. 812) the court reviewed an order of the Commission which had held unlawful the rates to Lake Erie ports from the coal producing territory in West Virginia, Virginia, Tennessee and Kentucky. The court found that, aside from the form of the order, the Commission's action was partly based upon an effort to regulate economic conditions in this and in a competing coal area through adjustment of rates, and must therefore be set aside. Judge Parker, for the unanimous court, stated the basis of the decision as follows:

"To understand, however, exactly what the power is which the Commission has assumed to exercise, it is necessary that we go behind its merely formal conclusions that rates are reasonable or unreasonable, and ascertain exactly what it is that it has done, and upon what facts and upon the application of what principles

it has arrived at its conclusions. This it is our duty to do. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283; *U. S.* v. *N. Y. Central Railroad*, 263 U. S. 603, 44 S. Ct. 212, 68 L. Ed. 470." (pp. 464-465.)

* * * * * *

"*We think that the enforcement of the order here complained of should be enjoined: (1) Because the Commission exceeded its powers, in that its action was based, in part, at least, upon industrial conditions, and was essentially an effort to equalize industrial conditions or offset economic advantages through adjustment of rates;* * * *." (p. 471.)

"The Commission does not have the right, however, to regulate industrial conditions under the guise of regulating rates." (p. 472.)

"But nowhere is it provided that in doing so the Commission may prefer one section of the country over another, or that it may fix rates, or may prevent the fixing of rates by the carriers, with a view of placing competing producers upon an equality or of compensating for disadvantages under which competing communities may labor. Manifestly such a power is not conferred by the statutes referred to, for rates fixed with such an end in view are not 'reasonable,' but are unreasonable and constitute an unprecedented interference with the industrial conditions of the country." (p. 472.)

"To conclude, therefore, we think that in entering the order complained of the Commission exceeded its powers and proceeded upon erroneous theories of law. We think that its action was essentially an effort to equalize industrial conditions or to offset economic advantages by rate adjustments, not warranted by anything contained in the Transportation Act of 1920 or in the Hoch-Smith Resolution." (p. 479.)

Professor Sharfman, in his treatise entitled *The Interstate Commerce Commission*, Vol. III-B (1936), warns explicitly against the dangers of permitting the Commission to assume the regulation of industrial conditions

under the easy guise of regulation of rates. He states, in part, as follows:

"Whatever the extent of the authoritative recognition of commercial factors, the question should be raised as to its propriety, from the standpoint both of legal validity and of economic policy. * * *

"On the other hand, to approve an arrangement of charges, even passively and by way of non-interference, because it increases commercial competition, or broadens sources of supply, or develops natural resources, or gives a fair share of business activity to this or that locality, port, or point of interchange, is to adopt an entirely different regulatory policy. If the arrangement is in keeping with accepted measures of transportation service, or if it is compelled by carrier competition, it needs no such reasons to justify it; if, lacking other support, it does need them, decision on such grounds would seem to constitute that arbitrary determination of where goods shall be produced or marketed which the courts, as well as the Commission, have deemed to be contrary to law. * * *

"When rates are made to conform to transportation tests, producing and distributing communities enjoy such success as their location and other economic characteristics naturally afford; when, on the other hand, commercial equalization is recognized as a desirable goal, the effects of these natural advantages and disadvantages tend to be nullified. *It is easy for the Commission, in its general pronouncements, to declare repeatedly that it is not concerned with so adjusting rates as to equalize opportunities, and then, in its subsidiary declarations and in its disposition of proceedings, to find actual merit in various aspects of commercial equalization. Because of this fact it is important to insist that the two approaches are fundamentally inconsistent, whatever the guise in which they are presented.*" (pp. 685-687.)

In sharp contrast to the decisions of this Court and of the District Court in the cases cited above, the lower court in the present case held that it must close its eyes to the

substance of what the Commission was doing as long as the report contained formal findings to give another basis for it. The District Court stated that:

> "The Commission found on substantial evidence many so-called primary facts * * * showing * * * kinds of markets, natural resources, commodities produced or manufactured in the various territories and the parts thereof, and found preference, prejudice, and discrimination as above set forth. * * * *For instance, it would be unlawful because discriminatory to try to equalize clearly inherently unequal business conditions, not due to existing freight rates in the various territories or any regions or districts therein, by manipulating rates. Anchor Coal Co.* v. *United States*, 25 F. (2) 462. We might think that *the probable import of this order, but we are bound by the Commission's action* in justifiably finding facts to give another and a lawful, basis for it. * * * Nor can other like considerations prevail to brush aside the statutory control over rates which has been confided to the Commission." (R. 1436.)

The District Court went on to hold that although it found the ultimate object of the order to be the dislocation of industry from Official Territory and its establishment in the other territories, the court must stand aside because that is a matter of legislative policy, the wisdom of which is in the exclusive cognizance of the Commission. In so holding, the District Court failed to follow the decisions cited above that the Commission has been granted no jurisdiction over the legislative policy of the regulation of industry and that it is the responsibility of the courts upon review to examine the substance of the Commission's action and to be alert to protect against industrial regulation by the Commission despite the guise in which it may be presented.

The attempt of the majority of the Commissioners in this proceeding to diffuse the population and industry of

the country by setting rates on a basis which disregards the actual transportation conditions is wholly unauthorized and arbitrary. We shall show in a later section of this brief that the Commission was led into this position by its erroneous conception of the effect of the Transportation Act of 1940 as constituting a mandate to it to bring about equalization in the several territories. On the recognized and lawful standards of rate-making, there is no support or justification for the Commission's order in the social and economic data.

II.

THE COMMISSION'S ORDER IS VOID BECAUSE THE REDUCED RATES PRESCRIBED BY THE COMMISSION FOR LESS-THAN-CARLOAD TRAFFIC ON WESTERN RAILROADS WOULD BE CONFISCATORY.

The Commission's determination to establish national uniform rates in this proceeding, notwithstanding all considerations of territorial differences, resulted in an order which would require the Western railroads to reduce the rates on less-than-carload traffic to a point so low that the prescribed rates would fail, by a wide margin, to meet the costs of that traffic. And the Commission took that action after having measured and found those costs in this proceeding. In our petition to the Commission for reopening, reargument and reconsideration, we urged that, on the face of the Commission's own decision, "the reduced basis ordered by the Commission is confiscatory." (R. 12670.) The Commission's supplemental report failed to mention this most fundamental contention.

We shall show that the Commission found that the existing rates on less-than-carload traffic were below the costs of the service. It found that the deficit thus incurred on

the Western railroads was the greatest deficit in all the country, both in total dollar amount and in the deficit per ton. We shall show that the Commission, after having expressly stated that the costs found by it, in terms of cents per unit of traffic, were only part of the actual full costs, then proceeded to order reduced rates which would be *lower* than those limited or partial costs. The Commission found those costs both on the basis of the normal actual loading (4.3 tons) and also on the basis of the ten-ton wartime loading that was required by the emergency order of the Office of Defense Transportation starting in the fall of 1942. And, on either basis, the costs *exceed* the prescribed rates for the large bulk of Western less-than-carload traffic.

Indeed, in many cases the bare out-of-pocket expenses of such traffic, which were found by the Commission, are greater than the prescribed rates themselves. We shall compare the costs with both the so-called interim rates prescribed by the Commission and with the permanent rates prescribed by it. We shall show that the rates would be less than the costs both for 1939, which is the test year for this investigation, and for January 1, 1946, which is the date on which the order would have taken effect by its terms. We shall further show that the findings and orders of the Commission in the recent general rate case, *Ex parte No. 162, Increased Railway Rates, Fares and Charges, 1946*, decided December 5, 1946, confirm the findings in this proceeding that the costs are higher than the rates, and that this is true now as well as at the earlier dates.

The District Court stated that the evidence indicated that the reduced rates for third and fourth class traffic in the West, which apply to the great bulk of the traffic, "will not produce enough revenue to pay the cost of their carriage when the *ad interim* reduction in class rates becomes effective." (R. 1427.) However, the District Court de-

cided that those reduced rates, notwithstanding that evidence, should be allowed to go into effect for a "trial period" and therefore provided that the dismissal of this petition of the Western railroads would "be without prejudice to another suit to restrain the enforcement of the *ad interim* rates if they are found, after a fair test, to be confiscatory." (R. 1439.) The District Court declined to make a finding of confiscation in advance of such a trial period. (R. 1438.) We shall show that the evidence in this record and the findings of the Commission so clearly demonstrate that the reduced rates would be less than the cost of transporting the traffic that the Court erred in failing to set aside the Commission's order, without waiting for the accrual of losses to the Western railroads through the actual operation of the confiscatory rates.

A.

THE FINDINGS AND EVIDENCE DEMONSTRATE THAT THE PRESCRIBED RATES WOULD BE LESS THAN THE COSTS.

The Commission's Cost Section made a detailed study of the costs of transporting less-than-carload traffic on Western railroads. The Commission, however, did not purport to ascertain the full costs allocable to such traffic. The costs which it determined were primarily the out-of-pocket expenses which increase or decrease directly with the volume of traffic. "In short, the out-of-pocket costs constitute that portion of the carriers' expenses which increase or decrease in direct proportion to changes in the carrier's traffic volume, *i. e.*, in direct proportion to the total amount of work performed." (Ex. 12, p. 7, R. 5757; offered at R. 1740.) The Commission's witness declared: "The out-of-pocket costs are those costs which would be added because of an increase in traffic or which would be eliminated because of a decrease in traffic." (Ex. 3, p. 69, R. 5211; offered at 1558.)

To these out-of-pocket expenses the Commission added only that part of those constant or fixed expenses which is

solely related to the less-than-carload traffic. It did not allocate to the less-than-carload traffic any part of the constant or fixed expenses which are related to all traffic and constitute a large proportion of the total costs, such, for example, as the costs of maintenance of way, general expenses and taxes. We emphasize the fact that the Commission's costs which did not include these elements are, nevertheless, in excess of the prescribed rates, because this Court has held that to avoid confiscation, rates set by regulatory bodies must be such that all commodities bear a fair proportion of all items of expense.[1] The Commission found:

"The less-than-carload costs do not include any of

[1] This Court has ruled as follows: "* * * we entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered. We find no basis for distinguishing in this respect between so-called 'out-of-pocket costs,' or 'actual' expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported. That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry. The State cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost, the entire cost must be taken into account." (*Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 596-597 (1914).)

the constant or fixed costs common to all traffic." (Report, R. 198.)

Those common costs in the Western territory for the test year, 1939, amounted to $351,761,730, no part of which was allocated in the cost study to less-than-carload traffic. (Ex. 13, Table 6, p. 11, R. 5972; offered at R. 1742.) The Commission's costs are not the full costs, and we ask the Court especially to note that even the partial costs *exceed* the reduced rates prescribed for the Western railroads.

1.

The Commission Found That the Western Less-Than-Carload Traffic Is Carried at a Heavy Deficit Under Existing Rates and That the Western Deficit Is the Largest in the Country.

The Commission found that in the test year, 1939, the Western railroads suffered a deficit of $34,348,277 in attempting to meet the costs of transporting the Western less-than-carload traffic under the existing rates. (Report, R. 200.) It found that the deficit in the East on that basis was much less, namely, $26,153,151 and that the South had no substantial deficit, if any.

On a unit basis, for comparative purposes, the Commission thus found that for each ton of less-than-carload traffic in the West, the Western railroads had a loss of $7.07. In contrast, the Eastern lines had a loss of only one-half that amount, or $3.75 per ton. The explanation, of course, lies in the fact that although the Western rates were substantially higher than the Eastern rates, the Western costs were relatively even higher.

The Commission stated:

> *"Costs in the West are 27 percent higher than in the East, including New England but excluding Pocahontas. Less-than-carload traffic as a whole, is carried at a deficit in all territories*, except possibly in the South." (Report, R. 206.)

In its general conclusions the Commission then stated:

> "The weighted-average rate is, therefore, the best criterion for judging the sufficiency of the less-than-carload rates in the light of the costs. Such an analysis unmistakably reveals the fact that less-than-carload traffic generally in all the territories is not bearing its proper share of the costs of transportation—in fact, excluding wartime loading, *it is not yielding, on the average, its out-of-pocket costs plus constant expenses solely related to this traffic, plus the cost of collection and delivery, in any territory* except possibly in the southern where the margin of difference between revenues and these expenses is slight." (Report, R. 312.)

These overall findings of the Commission confirm that the Western railroads, under their existing rates, not only suffered deficits in meeting the costs of their less-than-carload traffic, but have failed by a wide margin on those existing rates to meet the basic out-of-pocket expenses plus that small part of the total common expenses that is related *solely* to less-than-carload traffic. The largest part of all that less-than-carload traffic is carried on the class rates that are here in issue. Since the existing rates were found not to be compensatory, the order further reducing rates would be both arbitrary and confiscatory.

2

The Commission Found That in the Test Year, 1939, the Partial Costs per Unit of Western Less-Than-Carload Traffic (Both on the Normal Loading of 4.3 Tons and on the Wartime Loading of 10 Tons) Exceeded the Reduced Interim and Permanent Rates Ordered by the Commission.

The costs shown in the following tables are computed directly from the Commission's cost studies in this case for the test year, 1939. As mentioned above, the Commission stated that these costs for less-than-carload traffic do not include *any* of the fixed costs common to all traffic; they are but partial costs. The Commission's partial costs were divided into factors for the line haul and for the terminal expenses, in order that the costs could be ascertained for each of the various lengths of haul. The studies also showed the cost factors from which can be computed the costs not only on the basis of the actual average load (4.3 tons) but also on the basis of a ten-ton load. (Ex. 13, R. 5932, offered at R. 1742.) The cost studies direct the inclusion of ten percent of the line-haul costs to cover the average circuity of route as compared with the so-called short-line route. (Ex. 12, p. 93, R. 5843; offered at R. 1740; Report, R. 199.) The Commission further found separately the costs for pickup and delivery expenses on the less-than-carload traffic. (Report, R. 200.) Moreover, the Commission found separately the other bare out-of-pocket expenses and the fixed expenses which are *solely* related to less-than-carload traffic. We shall show comparisons of the reduced rates both with the out-of-pocket expenses and with the figures which represent the sum of the partial costs found by the Commission.

The rates shown in the following tables are for the rate classifications applicable to the bulk of the Western less-

than-carload traffic. Many thousands of commodities move on class rates and are assigned to one or another of the several classification ratings. The rating of each depends on its transportation characteristics. These ratings are described as first class, second class, third class, etc., and the rate for the classes is a specified percentage of the first class rate. The Commission found that "In all three territories the average rate on such less-than-carload traffic is above fourth class and below third class * * *." (Report, R. 183.) Therefore, the rates shown in the tables below are the reduced third and fourth class rates, both on the interim and on the permanent basis, as prescribed by the Commission.

The following comparison of the Commission's cost findings with the reduced Western rates for third class traffic, which moves at a rate *higher than the average* Western less-than-carload traffic, shows that *the reduced rates prescribed by the Commission would fail, by from 21 to 38 cents per hundred pounds, to meet the 1939 costs of transporting that traffic*, on the basis of the actual average loading, 4.3 tons.

DEFICIT PER CWT. UNDER REDUCED *THIRD*-CLASS RATES.

(Costs on Basis of Actual *4.3 Tons* Loading.)

Miles	1939 Costs	Zone I Interim Rates	Interim Deficit	Uniform Permanent Rates	Permanent Deficit
100	$0.73	$0.49	$0.24	$0.49	$0.24
300	0.98	0.77	0.21	0.77	0.21
500	1.24	0.98	0.26	0.98	0.26
700	1.49	1.23	0.26	1.19	0.30
900	1.74	1.42	0.32	1.39	0.35
1000	1.87	1.51	0.36	1.49	0.38

When a comparison is made between the costs and the reduced rates for fourth class, the deficit that would be created by the Commission's order is, of course, even larger. The following table measures the deficit on the same basis as the preceding table except that the rates are for the fourth class traffic.

DEFICIT PER CWT. UNDER REDUCED *Fourth*-CLASS RATES.
(Costs on Basis of Actual *4.3 Tons* Loading.)

Miles	1939 Costs	Zone I Interim Rates	Interim Deficit	Uniform Permanent Rates	Permanent Deficit
100	$0.73	$0.39	$0.34	$0.39	$0.34
300	0.98	0.61	0.37	0.61	0.37
500	1.24	0.77	0.47	0.77	0.47
700	1.49	0.97	0.52	0.94	0.55
900	1.74	1.12	0.62	1.09	0.65
1000	1.87	1.19	0.68	1.17	0.70

It will be seen that *the reduced fourth class Western rates would be non-compensatory by from 34 cents to 70 cents per hundred pounds.* The deficits on the full basis of costs would, of course, be greater than are shown above, since the Commission's costs, set out in these tables, do not include any part of the constant or fixed costs that are common to all traffic.

Moreover, when a comparison is made between the reduced rates and that part only of the foregoing costs which the Commission found to be the bare out-of-pocket expenses of handling less-than-carload traffic, it will be seen that *the reduced rates are so low that they do not meet the out-of-pocket expenses.*

DEFICIT PER CWT. UNDER *Out-of-Pocket Costs* AT REDUCED *Fourth*-CLASS RATES.

(*Out-of-Pocket Costs Only*, on Basis of Actual *4.3 Tons* Loading.)

Miles	1939 Costs	Zone I Interim Rates	Interim Deficit	Uniform Permanent Rates	Permanent Deficit
100	$0.50	$0.39	$0.11	$0.39	$0.11
300	0.74	0.61	0.13	0.61	0.13
500	0.98	0.77	0.21	0.77	0.21
700	1.23	0.97	0.26	0.94	0.29
900	1.47	1.12	0.35	1.09	0.38
1000	1.59	1.19	0.40	1.17	0.42

In the case of the third class traffic, the interim rates and the permanent rates would exceed these 1939 out-of-pocket expenses at only one of the six mileages shown. (Compare out-of-pocket expenses in table immediately above with third-class rates in preceding table.)

The deficiencies in the prescribed rates under the actual out-of-pocket costs as found in the Commission's cost study show forcibly that the Commission disregarded both the statutory and constitutional standards in ordering a reduction in the Western rates.

The foregoing findings were made on the basis of the actual conditions prevailing in Western Territory in the test year, 1939. The Commission found that the average loading of less-than-carload traffic in Western territory in that year was 4.3 tons. (Report, R. 198.) The District Court discussed this loading and found that such loading was normal for several years before 1939. (R. 1426.) The Commission found in *Western Trunk-Line Class Rates*, 164 I. C. C. 1, 87 (1930) that the average through the 1920's "appears to be between 4 and 5 net tons and probably nearer the smaller than the larger figure". Despite

the increase in traffic with the growth of lend-lease activities in 1941, and the marked increase in 1942 after the United States entered the war, the loading remained at approximately that point until the effective date of the Office of Defense Transportation's General Order No. 1.[1] (R. 909.) The ODT stated that it recognized its order would cause hardship both to carriers and to shippers, but was necessary as a wartime emergency measure. It set six tons per car as the minimum load, effective May 1, 1942, to July 1, 1942. It then set eight tons as the minimum until September 1, 1942. After that date the minimum was set at ten tons. The order provided for a 36 hour delay in shipment as an effort to gather that high load, and further provided that if, after that delay, the required load had not been received, the carrier must turn over the articles to motor carriers or to other railroads.

It is therefore of interest to compare the interim rates prescribed by the Commission with that portion of the Commission's cost study which shows what its partial Western costs in the test year would have been if the average loading had been as high as ten tons. The following table shows that comparison.

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[1] "During 1941 there was a total of 8,041,000 cars containing less carload freight (L.C.L.) forwarded from originating or transfer stations by Class 1 carriers and, in addition, 780,000 cars used as trap or ferry cars in intra-terminal movement. Merchandise traffic, therefore, requires the equivalent of over 100,000 closed cars out of a total of about 850,000 cars. The L.C.L. tonnage carried is less than 1½% of total railway tonnage. The inter-city cars on the average contained *approximately 5.3 tons.* * * * The intra-terminal cars averaged *only 2 tons per car.*" Office of Defense Transportation Statement, March 24, 1942, reported in Commerce Clearing House, Federal Carriers' Service, Par. 6301j.

DEFICIT PER CWT. ON REDUCED *Fourth*-CLASS RATES.
(Costs on Basis of Wartime *10-Ton* Loading.)

Miles	1939 Costs	Zone 1 Interim Rates	Interim Deficit	Uniform Permanent Rates	Permanent Deficit
100	$0.60	$0.39	$0.21	$0.39	$0.21
300	0.73	0.61	0.12	0.61	0.12
500	0.87	0.77	0.10	0.77	0.10
700	1.00	0.97	0.03	0.94	0.06
900	1.14	1.12	0.02	1.09	0.05
1000	1.20	1.19	0.01	1.17	0.03

Thus the findings show that if the emergency order had been in effect in the test year, 1939, so that the carriers and shippers would have had to incur the hardships incident to a ten-ton loading of this type of traffic, the partial or incomplete Western costs would have exceeded by a wide margin the reduced rates prescribed by the Commission. The Commission's cost findings demonstrate that the rates it prescribed would have been confiscatory either on the basis of the actual loading or on the basis of the ten-ton load required by the emergency order.

3.

At the Price and Wage Levels on January 1, 1946, the Commission's Cost Findings Demonstrate That the Reduced Interim and Permanent Western Rates Would Be Drastically Non-Compensatory, Both on the Normal Loading of 4.3 Tons and on the Wartime 10-Ton Loading.

It is notorious that in the years since 1939, the railroad wages, payroll taxes and prices of materials and supplies have greatly increased. Drastic as are the deficits shown above, they do not measure the full amount of the deficits on this less-than-carload traffic that would have been forced upon the Western railroads if the Commission's order re-

ducing rates had gone into effect. We shall show below in two different ways the serious effect of those recent cost increases upon the Western railroads. First, we shall discuss the evidence introduced in the District Court which showed the increase in costs from 1939 to January 1, 1946. It was this evidence, together with the findings of the Commission, to which the District Court referred as indicating that the rates would be confiscatory. (R. 1427.) Second, we shall discuss the findings of the Commission itself in the recent emergency rate case, *Ex parte No. 162, Increased Railway Rates, Fares and Charges, 1946,* in which the Commission found that costs had increased since 1939 *in an amount more than twice as large as the amount of the increase in rates finally granted by the Commission.*

The cost increases from 1939 to January 1, 1946 are unquestioned. It is not necessary to go into detail as to these increases, but it should be pointed out that in the evidence before the District Court, the effect of those increases and the basic data as found by the Commission's Cost Section for the test year, 1939, were unchanged except for the addition thereto of the proper percentages of increase in the wages, payroll taxes and prices of material and supplies on the Western railroads from 1939 to January 1, 1946. (R. 919-921, 926-933.)

The reduced interim and permanent rates prescribed by the Commission for Western third class traffic would produce *deficits of from 13 cents to 15 cents per hundred pounds under the bare out-of-pocket expenses* of the Western railroads for transporting that traffic, as of the effective date of the order, January 1, 1946. And it will be recalled that the third class rate is higher than the average. (Report, R. 183.) The tabulated deficits on this basis are as follows:

DEFICIT PER CWT. UNDER *Out-of-Pocket Costs* ON REDUCED *Third*-CLASS RATES AS OF *Jan. 1, 1946.*

(Out-of-Pocket Costs on Basis of *4.3 Tons* Loading.)

Miles	Jan. 1, '46 Costs	Zone I Interim Rates	Interim Deficit	Uniform Permanent Rates	Permanent Deficit
100	$0.62	$0.49	$0.13	$0.49	$0.13
300	0.91	0.77	0.14	0.77	0.14
500	1.21	0.98	0.23	0.98	0.23
700	1.50	1.23	0.27	1.19	0.31
900	1.79	1.42	0.37	1.39	0.40
1000	1.94	1.51	0.43	1.49	0.45

The reduced rates at the *fourth* class level would be *from 23 cents to 77 cents per hundred pounds under the out-of-pocket expenses as of January 1, 1946.* The deficit results at the various mileages on this *fourth* class traffic are as follows:

DEFICIT PER CWT. UNDER *Out-of-Pocket Costs* AT REDUCED *Fourth*-CLASS RATES AS OF *Jan. 1, 1946.*

(Out-of-Pocket Costs on Basis of *4.3 Tons* Loading.)

Miles	Jan. 1, '46 Costs	Zone I Interim Rates	Interim Deficit	Uniform Permanent Rates	Permanent Deficit
100	$0.62	$0.39	$0.23	$0.39	$0.23
300	0.91	0.61	0.30	0.61	0.30
500	1.21	0.77	0.44	0.77	0.44
700	1.50	0.97	0.53	0.94	0.56
900	1.79	1.12	0.67	1.09	0.70
1000	1.94	1.19	0.75	1.17	0.77

The out-of-pocket costs shown above are the costs which, as the Commission found, vary directly in proportion to the volume of traffic. In other words, unlike the fixed expenses, *the addition of more traffic would not reduce the expenses per unit;* it would simply increase the aggregate

deficit. The impact of the rising levels of wages and prices of materials and supplies is felt directly upon such out-of-pocket expenses.

The following table shows the heavy deficits under the reduced third class rates when the rates are compared with the Commission's out-of-pocket costs plus only those constant costs which are solely related to less-than-carload traffic, as of January 1, 1946. *The rates would fail by from 42 cents to 80 cents per hundred pounds to meet the costs.*

DEFICIT PER CWT. ON *Third*-CLASS REDUCED RATES AS OF *Jan. 1, 1946.* (Costs on Basis of *4.3 Tons* Loading.)

Miles	Jan. 1, '46 Costs	Zone I Interim Rates	Interim Deficit	Uniform Permanent Rates	Permanent Deficit
100	$0.91	$0.49	$0.42	$0.49	$0.42
300	1.21	0.77	0.44	0.77	0.44
500	1.52	0.98	0.54	0.98	0.54
700	1.83	1.23	0.60	1.19	0.64
900	2.13	1.42	0.71	1.39	0.74
1000	2.29	1.51	0.78	1.49	0.80

The corresponding deficits on the fourth class traffic under the reduced rates, as of January 1, 1946, are substantially larger, ranging from *52 cents to $1.12.* The tabulated deficits on this fourth class traffic as of that date are as follows:

DEFICIT PER CWT. ON REDUCED *Fourth*-CLASS RATES AS OF *Jan. 1, 1946.*

(Costs on Basis of *4.3 Tons* Loading.)

Miles	Jan. 1, '46 Costs	Zone I Interim Rates	Interim Deficit	Uniform Permanent Rates	Permanent Deficit
100	$0.91	$0.39	$0.52	$0.39	$0.52
300	1.21	0.61	0.60	0.61	0.60
500	1.52	0.77	0.75	0.77	0.75
700	1.83	0.97	0.86	0.94	0.89
900	2.13	1.12	1.01	1.09	1.04
1000	2.29	1.19	1.10	1.17	1.12

These deficits on the fourth class rates approximately equal the rates themselves. In other words, *the amount of the reduced rates ordered by the Commission is only about half of the Western costs determined by the Commission as adjusted to the January 1, 1946 levels of wages and prices.*

Moreover, even on the wartime ten-ton basis of loading, the Western deficits would be heavy under the reduced rates. On that ten-ton basis of loading the costs are found to be so high that the third class Western rates would produce *deficits ranging up to 27 cents per hundred pounds.* The table for traffic moving on third class rates, based on this emergency loading of ten tons, is as follows:

DEFICIT PER CWT. ON REDUCED *Third*-CLASS RATES AS OF *Jan. 1, 1946.*

(Costs on Basis of *10-Ton* Loading.)

Miles	Jan. 1, '46 Costs	Zone I Interim Rates	Interim Deficit	Uniform Permanent Rates	Permanent Deficit
100	$0.76	$0.49	$0.27	$0.49	$0.27
300	0.92	0.77	0.15	0.77	0.15
500	1.08	0.98	0.10	0.98	0.10
700	1.24	1.23	0.01	1.19	0.05
900	1.40	1.42	+ 0.02	1.39	0.01
1000	1.48	1.51	+ 0.03	1.49	+ 0.01

NOTE: "+" represents excess.

On the same ten-ton loading basis, and on the costs as of January 1, 1946, the findings show that the reduced fourth class rates would produce *deficits of from 27 cents to 37 cents per hundred pounds.* The table of deficits on this basis is as follows:

DEFICIT PER CWT. ON REDUCED *Fourth*-CLASS RATES AS OF *Jan. 1, 1946.*

(Costs on Basis of *10-Ton* Loading.)

Miles	Jan. 1, '46 Costs	Zone I Interim Rates	Interim Deficit	Uniform Permanent Rates	Permanent Deficit
100	$0.76	$0.39	$0.37	$0.39	$0.37
300	0.92	0.61	0.31	0.61	0.31
500	1.08	0.77	0.31	0.77	0.31
700	1.24	0.97	0.27	0.94	0.30
900	1.40	1.12	0.28	1.09	0.31
1000	1.48	1.19	0.29	1.17	0.31

The District Court found from the evidence in this case "that costs of the carriage have for some time been increasing and will probably show additional increases."

(R. 1427.) The extent of the increase in costs of the carriage since 1939 has been very recently determined by the Commission in *Ex parte No. 162, Increased Railway Rates, Fares and Charges, 1946,* (preliminary decision, 264 I.C.C. 695 (1946); final decision December 5, 1946) as follows:

> "The cumulative effect of the increases for wages, vacations, payroll taxes, materials and supplies, as estimated by the petitioners that have occurred in the period from 1939 to 1946, as applied to the 1946 operations, is at the rate of $2,166,920,000 per year." (Report, Dec. 5, 1946, mimeograph sheet 5.)

The Commission's estimate of the increase on the basis of 1947 over 1939 was stated to be $2,176,240,000. Against that annual increase in cost the Commission authorized an increase in rates which it found would yield close to $1,000,000,000 annually, on the same basis of traffic.[1] The increase thus covers less than one-half of the established increase in costs, and the difference represents the worsening of the carriers' earning position since the test year of 1939, notwithstanding the recent increases.

The prescribed rates are shown to be confiscatory by comparison with the Commission's 1939 cost basis. But, due to the rising tide of prices and wages, that comparison does not reveal the full measure of the deficits which would be sustained under the Commission's interim and permanent scales. By their evidence in the District Court the Western roads showed the increases in wages, materials and supplies, January 1, 1946 over 1939, and compared the unit costs, so increased, with the rates prescribed. It is that comparison which accurately measures the extreme losses which would be incurred under the class rates prescribed herein, notwithstanding the rate increases allowed in *Ex Parte 162.* The additional revenues allowed the Western roads in that proceeding were but little more

[1] The Commission so states in its official public release which accompanies the report.

than sufficient to cover only that portion of the increased costs which were sustained by the Western roads subsequent to January 1, 1946, and such costs were not included in the showing before the District Court.

Of the total increase of $2,176,240,000 in the cost of wages, materials and supplies since 1939, as found by the Commission, the Western roads' proportion of the increase, as shown by the exhibits from which that figure is derived, is approximately 40 percent, or a total cost increase in that territory of $873,000,000. Of that total, $360,000,000 represents the cost increases occurring in the West after January 1, 1946. The *Ex Parte 162* rate increase for the Western roads is approximately $375,000,000[1], which only slightly exceeds the increases in wages, materials and supplies after January 1, 1946, leaving practically nothing to compensate for the great increase in cost between 1939 and 1946, which was reflected in the showing in the District Court.[2]

The Commission's statements and its order in *Ex Parte No. 162*, strongly emphasize the inadequacy of the reduced class rates prescribed for application in the West. The 1939 costs themselves exceeded the interim and permanent rates, as shown in the comparative tables above, and, by 1946, those costs had sharply increased. The increased rates allowed in *Ex Parte 162* would compensate only for substantially less than half that increase in costs.

[1] This figure may be somewhat increased or reduced depending on the action to be taken by the states.

[2] Moreover, as shown on the basis of the report in *Ex Parte 162*, the levels for wages and materials *by May 1; 1946, as compared with 1945*, had increased in the annual amount of $634,000,000 for wages and $197,000,000 for materials and supplies. (264 I. C. C. 695, 730-731.) This total of $831,000,000, as the Commission noted, was in addition to the amount of the further wage increases of two and one-half cents per hour agreed upon on May 25, 1946, retroactive to May 22, 1946.

They would compensate only for the approximate amount of the increases in costs which took place in the short period from 1945 to May 25, 1946. Rates which are inadequate and confiscatory as measured by the 1939 costs are clearly more inadequate and confiscatory now by reason of the lengths to which the great increase in costs has exceeded the recent limited increase in rates.

B.

THE DISTRICT COURT ERRED IN HOLDING THAT THE INTERIM RATES SHOULD GO INTO EFFECT FOR AN EXPERIMENTAL PERIOD.

The District Court, although it stated that the evidence indicated the interim Western rates would be confiscatory, nevertheless held that the rates should be allowed to go into effect for an experimental period and that the Western railroads should then be permitted to sue again for an injunction against the continuance of those rates. That second suit, of course, would have to be brought *after* the confiscation had occurred and the losses had been sustained.

The District Court gave two reasons as to why it did not permanently enjoin these rates on the basis of the present record. The first reason was that "the statistical evidence to support that contention [of confiscation] was based on the assumption that the average car loadings would be as low as 4.3 tons, which was a low point average * * *." (R. 1427.) The second reason was stated to be that the evidence of confiscation "apparently did not take into account that part of the Commission's order which requires a minimum charge of 75 cents per shipment less-than-carload instead of the 55 cent minimum charge heretofore." (R. 1427.) We submit that neither of the two reasons is valid and that the Court erred in

relying upon them as the basis for its suggestion that there be an experimental test of the reduced rates.

As we shall point out, the loading of 4.3 tons per car was not "a low point average", but was the loading experience for years prior to the war and during the war until it was changed by an emergency order. It should be said first, however, that the reduced rates were shown to be confiscatory on a ten-ton loading as well as on the normal loading of 4.3 tons. In fact, much of the statistical data in the tables discussed above, comparing the prescribed rates with the costs, are on the basis of the wartime ten-ton load.[1] On that ten-ton load basis the Commission's cost findings, when compared with the reduced rates tabulated above, show that the Western costs for this traffic in the year 1939, before the increases in price levels, would exceed the rates. Moreover, the amount of that deficit is shown by the evidence to be much greater after the rise in prices and wages from the level of 1939 to the levels reached by January 1, 1946. On both the third and fourth class rates,[2] and with costs computed on the wartime ten-ton basis, the evidence shows that the costs would exceed the rates. The District Court erred in overlooking the data in the record (and in the brief of the Western railroads) which measure the costs on the ten-ton loading.

Moreover, the loading of 4.3 tons was not in any sense "a low point average" as stated by the District Court. On the contrary, that loading was normal for many years prior to the war. (R. 906.) The record demonstrates that the only reason why the average loading of less-than-carload traffic jumped in 1942 to six tons, then eight tons and then ten tons was because of the emergency

[1] See tables at pages 110, 115, *supra*.

[2] These are, respectively, above and below the weighted average rate on which the less-than-carload traffic moves in the West. (Report, R. 183.)

General Order No. 1 of the Office of Defense Transportation, a war agency. The delays and hardships both to the railroads and the shippers in maintaining such emergency loading are such, the evidence demonstrates, that the loading will drop to or below the pre-war basis upon the lifting of that emergency order. (R. 909-911.) There is no conflict in the evidence on this point.[1]

The second reason stated by the District Court for failing to issue a permanent injunction on the basis of the evidence which, it said, indicated that the reduced rates would be confiscatory, was that the evidence allegedly did not take into account "that part of the Commission's order which requires a minimum charge of 75 cents per shipment less-than-carload instead of the 55 cent minimum charge heretofore." (R. 1427.) This statement, which refers to the principal ground on which the government sought to meet the charge of confiscation in that court, reflects a serious misconception; the change in the minimum charge affords no defense to the charge of confiscation.

The minimum charge has not been merely 55 cents, as the District Court seems to assume, but has been *either* that amount *or* the applicable rate for one hundred pounds,

[1] The Office of Defense Transportation has recently begun to establish exceptions to its General Order No. 1. For example, cars used as "peddler," "pickup" or "way" cars are now entirely free from the loading requirement. (Gen. Order No. 1, as amended effective August 10, 1946, Commerce Clearing House, Federal Carriers Service, ¶ 6321d.) Cars of this type normally have had the lowest loadings of all less-than-carload cars. Similarly, the loading requirement for cars destined to any point in the great grain loading territory has been reduced to five tons. (General Permit, O. D. T. No. 1-4a, *id.*, ¶ 6306a.)

whichever is higher. (Rule 13, Consolidated Classification.[1]) Most of the minimum charges are collected on the basis of the hundred-pound rate, since that rate, for almost all distances, is higher than 55 cents, as is shown in the tables above. Since the Commission would drastically reduce the hundred-pound rate, *the net effect of its action upon the minimum charges,* exactly contrary to the assumption of the District Court, *would be to reduce the amounts of the minimum charges rather than to increase them.*

For example, take a shipment of 25 pounds (or any other amount less than 100 pounds).[2] Suppose it moves on the Western Zone I third class rate for a distance of 500 miles, which is almost exactly the average length of haul of Western less-than-carload traffic. (Report, R. 191.) That shipment, under the minimum charge rules, prior to the Commission's order, would take the third class rate for one hundred pounds, namely, $1.09. Under the Com-

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[1] Consolidated Freight Classification Number 17, Rule 13, p. 136:

"Unless otherwise provided in this Classification:
Section 1. The minimum charge for a single LCL shipment from one consignor to one consignee on one bill of lading shall be:
(a) If classified 1st class or lower, for 100 lbs. at the class or commodity rate applicable thereto; or
(b) If classified higher than 1st class, for 100 lbs. at the 1st class rate; or
(c) If shipment contains different articles, and no article is rated higher than 1st class, for 100 lbs. at the class or commodity rate applicable to the article taking highest rate; or if any one of the articles is rated higher than 1st class, for 100 lbs. at the 1st class rate; but
(d) In no case shall the charge on a single shipment be less than [55 cents]."

[2] Only a small fraction of the less-than-carload shipments would be of such light weight, since the average shipment of such traffic weighs 384.2 pounds. (R. 933.)

mission's order, that shipment would still be a minimum charge shipment taking the third class rate for one hundred pounds, but the rate itself would be *reduced* to $0.98. The result is, therefore, that what the Commission has done is to *reduce* the applicable minimum charge on the great bulk of minimum-charge traffic, and has increased the charge only on the negligible proportion of that traffic where the hundred-pound rate is less than 75 cents.

The small number of shipments that would be affected by the change from 55 cents to 75 cents is indicated by the fact that, on the Western Zone I third class rates, the only shipments affected would be the light weight shipments of 100 pounds or less moving a distance of 280 miles or less. *All* shipments on those third class rates moving farther than 280 miles would be at *reduced* rates, under the interim order, regardless of their weight. On the Western Zone I first class rates, *all* shipments moving farther than 120 miles would be at reduced rates under the order and the increase from 55 cents to 75 cents would affect only the lightest weight shipments moving 120 miles or less. On the Western Zone II first class rates, *all* shipments moving farther than 100 miles would be at reduced rates under the order, and the increase from 55 cents to 75 cents would affect only the lightest weight shipments moving 100 miles or less.[1]

Reference to the charge on the "average" shipment of this traffic emphasizes the irrelevance of the slight increase in the minimum charge to the confiscation issue. The average less-than-carload shipment in the West weighs 384.2 pounds (R. 933), and moves approximately 500 miles (R. 191) on an average rate which is between third and fourth class. The charge on such a shipment in Zone I, on the basis of both the interim and the permanent rate

[1] The respective rate scales are shown in the Report, Appendix 8, R. 359-361.

prescribed by the Commission, would be between $3.76 (third class) and $2.96 (fourth class).[1] As shown above,[2] even the partial costs of handling such shipments, as established by the Commission's findings, exceed the prescribed rates. The increase from 55 cents to 75 cents per shipment would not alter the fact that the great volume of this traffic would be carried on a cost basis, as found by the Commission, which exceeds the rates prescribed by it.

The District Court was therefore in error in assuming that the net effect of the Commission's order with respect to minimum-charge traffic was to increase the rates. But that Court was also in error in assuming, as it appears it did, that the confiscatory effect of the less-than-carload rates on the great bulk of the shipments could be ignored because the rates would be increased on the negligible few shipments on which an increased minimum charge would apply. The Commission expressly stated that the limited increase was intended solely to compensate for the costs of the particular shipments to which it was to apply. (Report, R. 320-321.) And, in any event, it has long been settled that confiscatory rates on certain types of shipments cannot be defended on the ground that there are increases on other types of shipments:

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[1] The rates on these average shipments are computed as follows: The first class rate for 500 miles in Zone 1, Western Trunk Line Territory, is $1,56 per hundred pounds, as shown in Appendix 8, R. 360. The prescribed interim rate is 10 percent less, or $1.40 per hundred pounds, and that is also the permanent rate as shown in Appendix 10, R. 381. The third class rate would be 70 percent of $1.40, or 98 cents, and 98 cents for a shipment weighing 384 pounds would be $3.76. The fourth class rate would be 55 percent of $1.40, or 77 cents per hundred pounds, and for the average shipment of 384 pounds a total charge of $2.96.

[2] This brief, pages 105, *et seq.*

> "• • • It does not aid the argument to urge that the state may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action." *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 598 (1915).

We submit that there is no merit in either of the reasons stated by the District Court for withholding a permanent injunction against these confiscatory rates until after they have been put into effect and a second suit has been commenced by the Western railroads. The effect of the prescribed rates in any test period would not be shown by the money remaining in the cash drawer at the end of that time as it might for a business with a less complicated accounting and cost system. The results would have to be shown by some such elaborate cost study as that made by the Commission here. This record and the Commission's findings demonstrate in the only manner that the fact can be demonstrated that the prescribed interim rates would be less than the costs. Where, as here, the evidence proves that the costs would exceed the rates, the order should be enjoined without compelling the Western railroads to suffer the losses which would be incurred in a test period. In *Northern Pacific Ry. Co.* v. *Dept. of Public Works,* 268 U. S. 39 (1925) the Court rejected the argument that the order reducing the rates should be allowed to go into effect experimentally, and Mr. Justice Brandeis, for the Court, stated:

> "If even the existing rates were confiscatory, as the carriers' evidence embodying the results of ample experience tended to show, there could be no reason for awaiting the test of the much lower rates which were prescribed. The cases which applied the prin-

ciple of awaiting the result of an experimental period for untried rates have no application here." (p. 45.)

The same rule applies to this case. The permanent injunction against these confiscatory rates should be granted now and not delayed until after the confiscation, which would be irremediable, has taken place.

III.

THE COMMISSION'S ORDER IS VOID BECAUSE THE COMMISSION MISCONSTRUED THE INTERSTATE COMMERCE ACT AND THE TRANSPORTATION ACT OF 1940.

It has long been settled that any order of the Commission based upon a mistake of law is void and should be set aside. *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541 (1912); *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658 (1930). In this case, the Commission predicated its decision upon the mistaken belief that by the amendments to the Interstate Commerce Act in 1940, Congress had required equalization and uniformity of rates among the various territories of the country and had drastically increased the authority and powers of the Commission. The Commission determined that the traditional standards of rate-making, recognized by the courts and by Congress for more than 50 years, were now to be observed only "in the light of" the Commission's construction of the amended law.

This was the stated and considered approach of the Commission to the evidence in the proceeding. The Commission received evidence and made findings showing the wide territorial differences in traffic and transportation conditions, but then, in the light of its view of the Trans-

portation Act of 1940, it held that any rate differential in the several territories would be unlawful.

The Commission stated that it based its conclusions upon three provisions of the Transportation Act of 1940. That Act was a comprehensive revision of the Interstate Commerce Act. Part I of the Interstate Commerce Act, which concerns railroads, and Part II, which concerns motor carriers, were revised in many respects, and Part III was added to bring water carriers under the regulation of the Commission. The parts relied upon by the Commission in this case consist of a portion of the declaration of policy added to the Interstate Commerce Act, an amendment to Section 3(1) of that Act, and a joint resolution commonly known as the Ramspeck Resolution which was enacted as Section 5(b) of the Transportation Act of 1940.

The part of the statement of policy to which the Commission referred in holding that there had been a change in the law and a mandate for uniformity, stated that one of the purposes of the Interstate Commerce Act is "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices." (54 Stat. 899, 49 U. S. C., p. 4281.)

The Transportation Act of 1940 also amended Section 3(1) of the Interstate Commerce Act by adding the words "region, district, territory" to read as follows:

> "Sec. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular

person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." (54 Stat. 902, 49 U. S. C. Sec. 3(1).) (The proviso was also added in 1940 but is not involved in this case.)

The Ramspeck Resolution reads as follows:

"(b) The Interstate Commerce Commission is authorized and directed to institute an investigation into the rates on manufactured products, agricultural commodities, and raw materials, between points in one classification territory and points in another such territory, and into like rates within any of such territories, maintained by common carriers by rail or water subject to Part I of the Interstate Commerce Act, as amended (this chapter), for the purpose of determining whether said rates are unjust and unreasonable or unlawful in any other respect in and of themselves or in their relation to each other, and to enter such orders as may be appropriate for the removal of any unlawfulness which may be found to exist: *Provided,* That the Commission in its discretion may confine its investigation to such manufactured products, agricultural commodities, and raw materials, and the rates thereon as shippers thereof may specifically request be included in such investigation." (54 Stat. 902, 49 U. S. C. Sec. 3, note.)

At the outset of its discussion of conclusions, the Commission said:

"While the rates in issue in this proceeding are to be tested by all pertinent provisions of the act, it is important to give particular attention to certain amendatory legislation which Congress has recently enacted." (Report, R. 303.)

The Commission then summarized the provisions set out above and asked the following rhetorical question which it answered in the affirmative:

> "Have these amendments to the act added any new inhibitions against discrimination or enlarged the power of the Commission over this subject?" (Report, R. 304.)

The Commission evidently recognized that, upon the face of the legislation, the answer was negative. Time and again the courts had stated that the policy of the Act since its original enactment in 1887 was to prevent unjust discrimination. Indeed, the Commission says in this report that:

> "Unjust discrimination in various forms was the principal evil aimed at in the original Act to Regulate Commerce." (Report, R. 304.)

The Commission quoted also the statement of this Court in the *Shreveport* case, 234 U. S. 342 (1914), "referring particularly to Section 3 which had remained unchanged up to that time since its original enactment, that the language 'is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn.'" (R. 304.)

The addition of "region, district, territory" in Section 3(1) merely recognized in specific terms what the Commission and all parties had understood that section to include. The class-rate structure in the West and in the East which the Commission here undertook to investigate had been established by the Commission itself under and pursuant to the Hoch-Smith Resolution which had directed the Commission to remove any unjust discriminations "as between the various localities *and parts of the country*". (43 Stat. 801, 49 U. S. C. Sec. 55.) In *Texas & Pacific Ry. Co.* v. *United States*, 289

U. S. 627 (1933), to which the Commission also referred, the majority opinion expressly recognized that Section 3 forbade discrimination among the shipping, producing and consuming "areas" and stated:

> "The word 'localities,' therefore, has its proper office as denoting the origin or destination of traffic and the shipping, producing, and consuming areas affected by rates and practices of carriers." (p. 638.)

That decision, holding that Section 3 did not apply to gateways or ports, as respects traffic merely passing through them, did not create any doubts whatsoever that the section fully protected all origin and destination areas.

Nor was there any mandate for uniformity or other substantive change on the face of the Ramspeck Resolution. That resolution, like the Hoch-Smith Resolution, merely directed an investigation and the removal of any unjust discriminations which might be found to exist.

But the Commission thought that it found in the legislative history of the foregoing provisions the mandate which changed the law as to uniformity of rates and as to the test of "discrimination". It said:

> "In seeking an answer to this question it is pertinent and helpful to review briefly the legislative background of these amendments." (Report, R. 304.)

The Commission therefore turned to the legislative history of the Transportation Act of 1940, apparently considering only those portions of that history which are set out in a footnote in its report at R. 306-307. It then concluded as follows:

> "Considering the breadth of the language used in the amendments here under consideration, the evils sought to be cured by this legislation, *the history of the times when the law was amended*, as well as the statements of the legislators as to the purposes of

the amendments—all proper aids of statutory interpretation—*it is clear that the main purpose which Congress had in mind was to bring about a greater degree of equalization, harmony, and uniformity in the different regional or territorial rate structures of the country.* The method employed to accomplish this purpose is equally plain. By the amendment to the substantive antidiscrimination provisions of Section 3(1) all discriminations in the form of undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, as between regions, districts, or territories, viewed as separate entities, were brought directly within the purview of the act along with all the other inhibitions previously included. We were then authorized and directed by the other provisions mentioned to remove any such discriminations found to exist in a proper proceeding. This means that such discriminations as those mentioned *which result from differences in the methods of distributing the general rate burden in the several rate-making territories, or from any other cause,* if not justified upon proper consideration of recognized elements of rate making *applied in the light of the amended law* are unlawful and should be corrected." (Report, R. 306-307.)

The foregoing states the Commission's understanding of the meaning and purport of the new law, namely, that the Commission had been directed "to bring about a greater degree of equalization, harmony and uniformity in the different regional, or territorial rate structures of the country" and that "the recognized elements of rate-making" were now made subject to the qualification that they could only be "applied in the light of the amended law". Just what the Commission meant by its interpretation of that amended law with respect to "equalization, harmony and uniformity," it made perfectly clear by its report and decision. Those words, to the Commission, did not mean that each territory was to have "uni-

form" rates in the sense that the rates were to be so constructed as uniformly to reflect the differing costs and other transportation conditions in the several territories. The existing rate structure, created by the Commission itself, already reflected those factors and conditions. To the Commission, the equalization and uniformity that it thought it was directed to achieve meant identical rates, mile for mile, everywhere in the country. For example, the Commission stated that its previous decisions "failed, however, to effectuate uniformity as between the territories. As a result of this incongruous situation, the interterritorial rates could not be properly harmonized with the intraterritorial rate structures." (R. 313.) Plainly the Commission, by "harmony" and "uniformity," in its reference to what it thought Congress had directed it to bring about, means "identical rates".

The full legislative history of the Transportation Act of 1940, on the contrary, clearly discloses that *both houses of Congress refused to enact the kind of legislation that the Commission has now construed the 1940 Act to be.* That legislative history makes it apparent that Congress never intended to put the freight rates of the different sections of the country into what Commissioner Porter, in his dissenting opinion, refers to as "the straitjacket" of a uniform scale of freight rates. (Report, R. 327.) The legislative history further demonstrates the deliberate and express refusal of Congress to broaden the powers of the Commission over the making of the territorial freight rates or to change the effect to be given to the recognized elements of rate-making.

A.

THE COMMITTEE OF SIX RECOMMENDED THE CONTINUANCE OF THE TERRITORIAL AND ZONE SYSTEM OF RATE-MAKING.

The Transportation Act of 1940 was the result, in part, of the recommendations of a Committee of Six appointed by the President in 1938. The Committee's report to the President, December 23, 1938, urged many changes in the Interstate Commerce Act, but, with reference to the different levels of rates in the different sections of the country, made the following recommendation:

> "*The Commission should, as at present, be allowed* reasonable latitude to modify or adjust any particular rate which it may find to be unreasonable or unjustly discriminatory and *to prescribe different rates for different sections of the country.*" (Report of Committee of Six, set forth in Volume I, Omnibus Transportation Bill, Hearings before Committee on Interstate and Foreign Commerce, H. of R., 76th Cong., 1st Sess. on H. R. 2531, pp. 259, 265-266.)

B.

THE SENATE COMMITTEE ON INTERSTATE COMMERCE WAS ADVISED BY THE COMMISSION ITSELF OF THE DANGERS OF UNIFORMITY OF RATES AND REJECTED BILLS PROPOSING TO AMEND THE INTERSTATE COMMERCE ACT TO PROVIDE FOR UNIFORM RATES.

Pursuant to the recommendation of the Committee of Six, the Omnibus Transportation Bill, S. 2009, 76th Cong., 1st Sess., was introduced in the Senate. A subcommittee of the Senate Committee on Interstate Commerce, of which Senator Wheeler was Chairman, considered several bills and resolutions dealing with the general subject of differences in the rate levels in the several territories of the country. These bills

varied in content. Several would have required the carriers to make their interterritorial rates for transportation between territories on the so-called "destination level" theory—*i.e.*, the theory that the interterritorial rate going into a territory should not exceed the intraterritorial rate for that article in the destination territory. Some proposed that the Commission be directed to formulate a plan for a uniform national rate structure and that it report its findings to Congress. Particular attention may be given to S. 137, 76th Cong., 1st Sess., introduced by Senator Bankhead of Alabama. The first part of S. 137 proposed the addition of the words "region, territory, subregion, subterritory" to Section 3(1) of the Interstate Commerce Act. In full recognition of the fact that such an amendment (which was the type of amendment that finally passed) would not make the substantive change in rate-making that certain Southern senators desired to accomplish, the second part proposed an amendment of the rate-making section of the Interstate Commerce Act as follows:

> "That section 15a of part I of the Interstate Commerce Act be amended by adding the following as paragraph (3):
>
> "'(3) The Commission shall also exercise its power to regulate rates in such manner as to abolish and eradicate, except when prevented by actual differences in transportation conditions, existing regional or territorial differences in rate structures and to establish and maintain in the future a reasonably uniform national rate structure for each type of service—freight, express, and passenger—to the end that there may be the freest possible flow of commerce among all regions, territories, and sections of the United States.'"

The Commission's construction of the 1940 legislation a paraphrase of the second part of this bill, S. 137,

which failed to receive approval by the committee or by either house of Congress except that the Commission has disregarded the great "actual difference in transportation conditions" which would have been recognized even under that legislation. In other words, *the Commission has taken what it conceived to be its directive, from the very legislation which Congress refused to accept and has construed that directive as being even more drastic than was the legislation that Congress rejected.*

One of the impelling reasons why the committee rejected the proposed bills directed toward the creation of uniform rates, while at the same time recommending the addition of the words "region, district, territory" to Section 3(1) was that the Commission itself, as then constituted, severely criticized the validity of the concept of uniform rates, drawing the attention of Congress to the wide differences among the various sections of the country, and pointing out that the recognized elements of rate-making result in proper territorial differences in rates and rate structures. On January 12, 1939, Senator Wheeler wrote asking the comments of the Commission on the proposed bills affecting the territorial rates. On February 8, 1939, the late Commissioner Joseph B. Eastman replied, stating that he had been authorized by the Commission to submit the comments on behalf of the Commission. He first stated that because there was then pending before the Commission the proceeding known as the "Southern Governors" case, the Commission could not comment fully upon the bills, but could make certain comments as to their practical operation. Despite the restriction, Commissioner Eastman, on behalf of himself and the other Commissioners, did not hesitate to condemn the proposal to bring about uniformity of freight rates, mile for mile, throughout the country. The letter stated, in part:

"The foregoing bills, while differing in details, have much in common. S. 126 and S. 158 would establish the principle for common carriers, subject to part I of the Interstate Commerce Act, that, distance considered, the freight rates on commodities moving into a rate-making or geographical area of the United States shall be no higher than the rates which apply locally on the same commodities within that area. This principle is not stated definitely in S. 137, but the objective appears to be similar.

* * * * * *

"(1) It would be impracticable to apply the proposed rule with respect to rates from one rate-making or geographical area to another without fixing the rates substantially on a mileage basis.

* * * * * *

"(3) The proposed rule accepts the principle that rates should vary with distance. The underlying reason for this is, of course, that the cost of the transportation service ordinarily increases as the length of the haul increases. Cost of service, however, is affected by other factors as well, such as density of traffic, the character of the terrain, and gathering or distribution operations at origin or destination. In theory there is as much reason why rates should vary with these other factors which affect cost as with distance. The proposed rule, however, gives consideration only to distance.[1]

* * * * * *

"(5) In considering the objective of a 'reasonably uniform national system of freight rates' proposed in S. 126 and 137, it should be borne in mind that the character of railroad freight traffic differs widely in the various sections of the country, dependent on the character of their industrial activities. Freight rates normally reflect these differences. A particular kind of traffic, such as grain, livestock, or petroleum, may

[1] This rule, criticized by the Commission and rejected by Congress, is precisely the rule that the Commission has now prescribed.

move in large volume and be given relatively low rates in a territory where freight rates are in general relatively high. There are also many important differences in competitive and transportation conditions. While the freight-rate structure of the country has many seeming inconsistencies, it is, after all, largely the product of evolution and adjustment to practical conditions, and any attempt to recast it abruptly into a radically different form, in disregard of such conditions, is likely to have results more disturbing than beneficial.

"While, for the reasons indicated at the outset of this letter, we believe that we should not now express views on the general merits of these bills, it can be said, without danger of prejudging the issues in any pending proceeding, that we see no objection to the amendment of section 3(1) of the act which is proposed in S. 137.

"Respectfully yours,

"JOSEPH B. EASTMAN,

"*Chairman, Legislative Committee.*"[1]

This letter is of unique significance in determining the Congressional intent in the legislation of 1940. The Commission there made it clear to Congress that the differences in territorial freight rates must arise from differences in density of traffic, the character of the terrain, the gathering or distribution operations at origin and destination, the character of industrial and agricultural activities, relative importance of particular commodities in the different sections, competition and other transportation conditions. Significantly, while the Commission realized that bills calling for uniform freight rates, mile for mile, such as

[1] The letter is set out in Vol. I, Omnibus Transportation Bill, Hearings before the Committee on Interstate and Foreign Commerce, H. of R., 76th Cong., 1st Sess., on H. R. 2531, pages 717-719, together with an accompanying letter to Chairman Lea of the House Committee referring to the letter to Senator Wheeler.

S. 137, would change the weight to be given to the traditional elements of rate-making, it quite evidently saw no such implications of uniformity in the addition of the words "region, district, territory" to Section 3(1). Yet the Commission has now interpreted that amendment to Section 3(1) to mean that it has been given a Congressional mandate to bring about uniform freight rates, mile for mile, and to cease giving their proper effect to the long-recognized elements of rate-making so recently emphasized by the Commission through Commissioner Eastman.

The comprehensive transportation bill, S. 2009, was reported by the Committee with no provision directed toward uniformity. The uniformity bills had failed to receive approval of the Committee. Instead, there was the addition of the three words to Section 3(1) and the provision for investigation by the Commission, not a direction to prescribe "uniformity," that word not being used in the resolution, but only to determine whether there was presently any undue and unjust discrimination. The latter provision, which was in the form of the Ramspeck Resolution (introduced in the Senate by Senator Hill), was Section 52 of that bill.

C.

SENATOR WHEELER ASSURED THE SENATE THAT NOTHING IN THE BILL WOULD BRING ABOUT EQUALIZATION OF FREIGHT RATES OR BROADEN THE POWERS OF THE COMMISSION OVER THAT SUBJECT.

The discussion on the floor of the Senate confirms the conclusion that Congress had no intention to equalize the rates. The Commission, in its report in this proceeding, referred to part of the comments of Senator Wheeler in the Senate, but the portion in which Senator Wheeler made it plain that no equalization of rates in the different terri-

tories was intended and that the differences in transportation circumstances were to be given the same full effect in rate-making that had always been accorded to them evidently did not come to the attention of the Commission. The following discussion between Senator Wheeler and Senator Frazier of North Dakota is directly contrary to the Commission's interpretation of the 1940 legislation:

> "Mr. Frazier. Is it the expectation of the committee that by the amendment in section 52 the rates in the various classification territories will be equalized or made the same in different territories?
>
> "Mr. Wheeler. *I do not think that is possible.*
>
> "Mr. Frazier. I do not see how it is possible. I was wondering what the intention was.
>
> "Mr. Wheeler. It is not possible for a number of reasons. For example, it *costs* more to carry freight over the mountains in two trains than to carry it on the plains in one train. Likewise, we must recognize the fact that railroad transportation service and rates depend somewhat on the *intensity of the traffic. In long stretches of territory with no traffic, shippers must pay more for railroad service than do shippers in a densely settled part of the country where traffic is plentiful* and where there is much competition from busses, trucks, and things of that kind. However, it seems to me from my study of the question that apparent inequalities[1] ought to be corrected.
>
> . . . . . .
>
> "Mr. Frazier. In North Dakota we have a large volume of wheat to transport in the fall of the year, and because we have that large volume, and because our territory is practically level, we have a rather beneficial rate on wheat as compared with some other territories. Our railroad commission and traffic experts are afraid that the provision to which reference has been made will take that special rate away from us.

[1] It is apparent from the context that Senator Wheeler, by the word "inequalities", means "unjust discrimination" in the traditional sense of those words, and that in his statement to Senator George (*infra*, pp. 141-142) the word "equalization" was used in the same sense.

"Mr. Wheeler. I believe this provision will help the people of the Senator's State rather than harm them in many respects.

"Mr. Frazier. We have a much lower rate than prevails in many other sections of the country. If rates are to be equalized, it will mean raising our rates.

"Mr. Wheeler. *The bill does not mean that rates are to be equalized.*" (Cong. Rec., Vol. 84, Part 6, p. 5890.)

We ask the Court to contrast this solemn assurance with the action of the Commission which holds that the rates must be identical to be lawful and that all the class rates set by the Commission itself are now, by virtue of the 1940 legislation, unjust, unreasonable and unduly prejudicial and preferential because they are not identical in all parts of the country despite the admitted differences in costs, density of traffic and other transportation conditions. Senator Wheeler's assurance to the Senate that "The bill does not mean that rates are to be equalized" is diametrically opposed to the Commission's order in this proceeding.

Senator Miller of Arkansas stated that he would propose an amendment striking out the words "unjust and undue" before the word "discrimination". He made it clear that he wanted a direction to the Commission to bring about equalization, "harmony" and uniformity rather than just the removal of "unjust and undue" discriminations. In other words, he wanted the type of legislation that the Commission has now in effect, said Congress did in fact adopt. Senator Wheeler's forceful reply made it plain that Congress did not intend to go beyond a direction to the Commission to investigate and then exercise its powers which it already had, not to equalize rates, but to remove only such discriminations as might be found to be unjust and

undue on the basis of the recognized elements of rate-making. The discussion was as follows:

"Mr. Hatch. Then, the position of the Senator is that the bill merely does not go far enough?

"Mr. Miller. That is all.

"Mr. Wheeler. I should really like to have the Senator or someone else on this floor tell me just what language should be written into the bill which would go further than what is now in it. It is easy, in making a political speech, to say that we want certain legislation, and want to do this and want to do that, but it is quite another thing for one, after he has made the speech or made the recommendation, to write the language which will actually accomplish what he wants to accomplish *without discriminating against someone else or some other community.*

"The Congress of the United States cannot make rates. The Congress must provide for a commission which will make rates. The Congress lays down broad general policies for that commission to follow. In the pending bill we have said to the Commission, 'We want you immediately to investigate the situation, and then we want you to issue orders which will correct the situation.'

"*The Senate cannot investigate to ascertain whether discriminations exist in one particular territory or in another particular territory,* because if we were to do that we would have time for nothing else; we would spend all our time for the next 10 years investigating to determine whether discriminations exist here, there, or somewhere else throughout the United States, so that we could frame legislation in an effort to correct the situation.

• • • • •

"I wish to say something else in reference to the Senator's proposed amendment. I agree with the purpose of the amendment; but I call the Senator's attention to the fact that we submitted the amendment [*i.e.,* the amendment proposed by Senator Miller] to members of the Interstate Commerce Commission, and they

told us that the language used in the amendment *would in many instances make it necessary for them to increase rates rather than to lower them.*" (Cong. Rec., Vol. 84, Part 6, p. 6068.)

The very dangers suggested by Senator Wheeler in any provision directing a change in the territorial rate levels, namely, that it would result in discrimination against someone else or some other community, and that it would in many instances require an increase in rates, are exemplified in the results of the Commission's orders in this case.

The legislative history discussed thus far was evidently not considered by the Commission. The portions of the legislative history to which the Commission's attention was directed and which it set out in its report as a basis for its conclusion that Congress had directed it to bring about a greater degree of uniformity were so separated from their context that they do not reflect the intent of Congress. One example is the quoted statement of Senator Wheeler that the intent of the bill was to make toward the "equalization" of regional rates, which he had denied flatly in his assurances to Senator Frazier. The full quotation from which this was taken shows that Senator Wheeler at that point was referring to the fact that the Transportation Act of 1940, by adding Part III to the Interstate Commerce Act, confers jurisdiction over water carriers and their rates upon the Interstate Commerce Commission:

> "Mr. George. The point I wanted to make was that in a great Nation such as ours, covering so wide an area, the opportunity for uniform development and progress is far more important than the mere fact that a rate in a particular region might have to be slightly raised.
>
> "Mr. Wheeler. If I may be pardoned for interrupting the Senator, I agree entirely with that statement, and I say to the Senator that, as a matter of fact,

that is what this bill seeks to do. We are seeking to put under the Interstate Commerce Commission the *regulation of all forms of transportation rates.*[1] What is happening? *A few people who are interested in shipping are coming here and saying: 'We want this particular group to have a special dispensation to get lower rates for a particular territory.' In so doing they are discriminating against the inland territory completely.* I agree exactly with what the Senator has said, and I say that this bill if enacted will have an extremely beneficial effect on the country taken as a whole.

"Mr. George. The Senator thinks that it will make toward the equalization of rates in the various regions?

"Mr. Wheeler. I do not think there is any doubt about that at all, because that is the purpose of the bill; it is the intention of the bill.

"Mr. President, I wish to call attention to the last provision of the amendment. It reads:

'It shall be unlawful to establish rates for any type of transportation which shall not be compensatory, as herein defined, where such rates are established to meet competition of other types of transportation or for other purposes.'

"I am afraid if that language were put in the bill it would have, on the whole, a very detrimental effect on some of the water carriers, because unquestionably some of the water carriers at present are carrying freight upon the Great Lakes and in some other places at a price that at least the railroads say is less than compensatory. If we put in the bill a provision that the rates have to be compensatory and that shippers cannot carry freight for less than a compensatory rate, I am afraid we would find that that language would be

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[1] Senator Wheeler was evidently referring here to Part III of the Interstate Commerce Act, added by the Transportation Act of 1940, which brought the regulation of water carriers under the Commission.

used against the very object the Senator desires to accomplish." (Cong. Rec., Vol. 84, Part 6, p. 6072.)

ertainly it is untenable to say that Senator Wheeler was peaking here of railroad rates and that he meant to re- uire equal railroad rates in the several rate territories. o do so is to accuse him of bad faith in his direct answer nd assurances to the contrary. He was speaking of the ater carrier regulations of Part III, for one thing, and ot of the territorial freight rates, and it seems clear also hat by "making toward equalization" he meant the re- oval of "inequalities" in the sense of unjust discrimina- ions in the traditional sense, and not the creation of a ingle nationwide uniform rate scale.

In debate on May 23, 1939, Senator Frazier of North Dakota and Senator White of Maine, a member of the Inter- tate Commerce Committee, asked Senator Wheeler for ssurance that the Ramspeck Resolution did not broaden he authority or the power of the Interstate Commerce Commission. It will be recalled that the Commission in this ase bases its decision on its conclusion that the historic imitations on its power had been removed and that the Transportation Act of 1940 had "enlarged the power of he Commission over this subject" (R. 304) and proceeded n accordance with that construction of the Act. Senator Wheeler stated specifically that it did not do so. The ssurance was given as follows:

> "Mr. Frazier. Mr. President, I should like to ask if there is any danger of intrastate rates being included in this amendment? I notice the phrase 'or in their relation to each other.'
>
> "Mr. Wheeler. *This provision does not broaden the authority of the Interstate Commerce Commission in the slightest degree.* It simply says that they shall carry on an investigation into these various territorial rates.

"Mr. Frazier. It would not affect intrastate rates at all?

"Mr. Wheeler. No.

"Mr. White. I understood the Senator to say that this provision conferred no new power and imposed no new obligation on the Commission. I had rather assumed that was so, except for the language appearing in the second line, which directs the Commission to proceed immediately. I take it that is a new obligation and a specific obligation.

"Mr. Wheeler. What I meant to say was that *that is a new obligation to proceed to investigate, but the powers of the Commission as to regulating rates are not changed at all.*

"Mr. White. *That was my impression. I merely wanted to have it confirmed.*" (Cong. Rec., Vol. 84, Part 6, p. 5984.)

These clear and explicit answers to the very question posed by the Commission as to whether its powers were increased were not mentioned by the Commission in its summary of the legislative history to which its attention had been directed.

It may be noted that even Senator Connally of Texas, one of the leaders in asking for legislation directly affecting the territorial rates, instead of the measure which the committee had recommended, expressly disavowed any intention to destroy the territorial pattern of rate-making. He was questioned by Senator Reed of Kansas, a member of the Committee on Interstate Commerce, as follows:

"Mr. Reed. I understand the Senator from Texas desires that the bill be made stronger?

"Mr. Connally. In that respect.

"Mr. Reed. Would the Senator suggest that we write the bill strong enough so as to remove the regional division of the State of Texas, which has been maintained by the Texas State authority for 70 years, since Texas established a railroad commission, and a

distinguished United States Senator, John H. Reagan, resigned from the Senate to become chairman of the Texas Railroad Commission, one of the early railroad commissions in the country? From that day to this the State of Texas by State authority has divided its own State into two regions, known as 'common point' and 'differential territory.' In the 'differential territory' they charge a higher rate than they do in 'common point' territory. There is no difference in principle between what Texas does by State authority—a continuing practice throughout the years—and what the Interstate Commerce Commission does.

"Would the Senator from Texas desire that we make the law sufficiently strong to require the State of Texas to remove the regional distinction which it maintains by State authority within the State of Texas?

"Mr. Connally. I have never heard the Senator from Kansas make a stronger argument than he has by citing the precedent in my State. *Of course, I did not mean to imply that all these regions should be done away with,* but I did mean that the differentials between the regions in many cases are outrageous." (Cong. Rec., Vol. 84, Part 6, p. 5889.)

The Senate then passed S. 2009 with the assurances from Senator Wheeler, Chairman, and Senator Reed, member, of the Interstate Commerce Committee, that the purpose of the bill was not to bring about an equalization or uniformity of rates in the different territories, that the territorial differences in cost, density of traffic and other transportation conditions were to be recognized as they had been in the past and that while the Commission was to be directed to investigate the various territorial rates, and remove any unlawfulness found to exist, the standard of unlawfulness and the Commission's authority and powers were not changed in the slightest degree. None of those assurances was mentioned by the Commission in reaching a contrary construction of the Act.

D.

THE H[OU]SE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE REJECTED THE PROPOSED AMENDMENTS TO BRING ABOUT UNIFORM RATES AND THE HOUSE WAS ASSURED THAT THE LEGISLATION RECOMMENDED AND PASSED WOULD NOT INCREASE THE AUTHORITY OR POWER OF THE COMMISSION OVER THE SUBJECT OF TERRITORIAL FREIGHT RATES.

S. 2009 was considered by the House at length, in July, 1939. The House Committee on Interstate and Foreign Commerce had held hearings and considered at length bills and resolutions on behalf of sectional interests of the same type as those referred to above in connection with the Senate Committee on Interstate Commerce. For example, one bill, H. R. 3369, 76th Cong., 1st Sess., introduced by Representative Bryson, on January 30, 1939, would have amended Section 15 of the Interstate Commerce Act to read as follows:

> "*Provided*, That the rates prescribed for any given rate-making or geographical section of the United States to which the Interstate Commerce Commission may adhere for rate-making purposes shall not be fixed in excess of the corresponding rates prescribed for any other rate-making section of the United States."

The same bill would have amended Section 15a of the Interstate Commerce Act as follows:

> "(3) The Interstate Commerce Commission shall revise existing rate structures in different rate-making sections of the United States, distance and other factors weighed, for the purpose of establishing and thereafter maintaining sectional and intersectional uniformity in rates, permitting the free and unfettered flow of commerce between different sections and States of the United States."

The House Committee also had the benefit of the comments of Commissioner Joseph B. Eastman in his letter on behalf of the Commission (quoted above at pages 135 and 136) setting forth the dangers of uniform rates and the necessity for recognition of the territorial differences in transportation conditions and other factors. (Hearings before Committee on Interstate and Foreign Commerce on H.R. 2531, 76th Cong., 1st Sess., pages 717 to 719.) It came to the same conclusions as did the Senate Committee, refused to recommend the bills setting uniform rates or calling for a study toward that object, and recommended instead only the changes adding the formal words "region, district, territory" in Section 3(1), and directing that an investigation be made into possible unjust discriminations. The House Bill, like S. 2009, thus contained the provisions which the Commission has now construed as a direction to bring about uniformity of freight rates. Here again, it was made definitely clear to the House that those provisions, contrary to the Commission's construction, *were not intended to bring about uniformity or equalization nor to increase the powers of the Commission nor to change the effect to be given to the elements of rate-making.*

Representative Lea of California was Chairman of the House Committee on Interstate and Foreign Commerce. In presenting the bill to the House, he said:

> "Now, I want to refer for a moment to the Ramspeck Resolution. That is embodied in this bill. It directs the Interstate Commerce Commission to make an investigation of certain freight differentials, and then to make the orders that are necessary to remove the unlawfulness of rates found to be unlawful. It further provides, in the provisions prohibiting discriminations, the protection of territories and districts. In my judgment that resolution is directed at what is one of the most important situations in rate structure.

It points to a place in our rate structure where the greatest opportunity to help our transportation system on an economic basis lies. The correction of that condition would serve the interests of shippers and carriers alike." (Cong. Rec. Vol. 84, Part 9, p. 9705.)

The pattern in the House followed that in the Senate with respect to the attempt to make differences in freight rates unlawful, *and with respect to the assurances to the representatives of the western states that the bill would not bring about uniformity of rates.*

Representative Kitchens proposed an amendment striking out the words "unjust and undue" before the word "discrimination." This amendment was defeated. In its consideration, there was the following discussion in which Representative Lea, Chairman, and Representative Patrick, a member, of the Committee on Interstate and Foreign Commerce, participated:

"Mr. Murdock of Arizona. Is it not true that for more than a half century the Interstate Commerce Commission has fixed our freight and passenger rates, and have they not in so fixing those rates acted properly, yet what they did might be called a discrimination?

"Mr. Patrick. Yes.

"Mr. Murdock of Arizona. In other words, the I.C.C. for years, in fixing rates, has discriminated but such was legal, reasonable, and not unjust. *All that this provides is that there shall be no unjust discrimination, and under this we will continue as in the past?*

"Mr. Patrick. *Certainly.*

"Mr. Lea. Mr. Chairman, I did not hear all the gentleman from Arizona stated, but *I call attention to the fact that for several decades this is language that has been a part of the transportation law of the country.*

"Mr. Patrick. I just mentioned that fact.

"Mr. Murdock of Arizona. Mr. Chairman, I rise to elaborate just a little bit on what I said to the gentleman from Alabama (Mr. Patrick). We have had now for more than a half century a great quasi-legislative, quasi-judicial corporation or body established and empowered by Congress to fix passenger rates by rail, namely, the Interstate Commerce Commission. It is true that they have shown preferences for certain commodities, and apparently for certain sections, but that is a part of the general scheme of ratemaking and no doubt was so intended. *There was no preference shown as between one locality and another or as between one commodity and another in any unfair or unjust manner. We propose in this act to continue the same policy.* (Cong. Rec., Vol. 84, Part 9, p. 9867.)

"Mr. Houston. What I had in mind is what the gentleman just stated, and I refer to wheat in my country. If this word were taken out, it would leave us in a bad way.

"Mr. Murdock of Arizona. I understand the farmers of the West have a certain preferential rate on their farm commodities. It would be too bad for the farming sections of this country if that word 'unjust' should be taken out and any and all discrimination thus forbidden, because those farmers from the West and middle West very likely would be made to pay on farm commodities the same amount per mile as on other freight and *that would be an equality which would be unjust. What is fair and reasonable ought to be continued.*

"Mr. Patrick. Is not the same thing true in respect to preference? Is it not often necessary to take care of an economic condition that a preference must be established?

"Mr. Murdock of Arizona. I feel sure that is correct.

"Mr. Patrick. If you pass a law taking out all preferences, then you would not be permitted to exercise 'due preference.'" (Cong. Rec., Vol. 84, Part 9, p. 9867.)

The following colloquy is enlightening as to whether the House believed the Ramspeck Resolution was, as the Commission has found, an addition to the rate-making powers of that body and as to whether the Southern members thought that the bill meant what the Commission has now held it to mean:

"Mr. Warren. I think subsection (b) is a mere jargon of words. The whole subsection is absolutely meaningless. It does not amount to a row of pins because *the Interstate Commerce Commission, under the general law today, has authority to do every single thing that it is intended to give them by this language put in the bill.*

"Mr. Whittington. *I agree with the gentleman.* For 50 years they have had the power and authority, but we have now in the pending section given them substantial direction and authorization to undertake to remove a discrimination, and I believe the amendment is fair and should be adopted."

. . . . . .

"Mr. Keefe. I did not hear the first part of the gentleman's statement; but I inquire as to whether or not there is any purpose or meaning in this entire paragraph. *The Interstate Commerce Commission now, under existing law, has all of that power; and is it not their duty to do so under the law?*

"Mr. Bulwinkle. Upon complaint; yes.

"Mr. Keefe. To make an investigation?

"Mr. Bulwinkle. Yes; upon complaint.

"Mr. Keefe. Then what does this paragraph mean?

"Mr. Bulwinkle. *It simply means that it is the Ramspeck resolution, put in at the request of the southern Members, and that is all that it does mean—to advise the Commission that Congress wanted an investigation.*

"Mr. Hinshaw. The only point about this paragraph that is of interest are the words in line 14 'and directed'. The Commission is already authorized to make an investigation, but this paragraph directs the Commission to make it.

"Mr. South. As I said on the floor of the House 2 or 3 days ago, the Ramspeck resolution, so-called, is nothing more than a sop, so far as our rate problem is concerned. I have a very high regard for my colleague the gentleman from Georgia (Mr. Ramspeck). He has worked diligently on this rate proposition, and I presume this is the best he could get; but I say to him and to my colleague from North Carolina (Mr. Bulwinkle) that *the Members who met with the gentleman from Georgia (Mr. Ramspeck) from time to time to protest against unjust discriminations and rate differentials did not agree to the Ramspeck proposal, and most of us do not agree to it now.*"

And a few minutes later Mr. South said:

"*It does not provide for a thing more than the Interstate Commerce Commission now has authority to do.* It says, 'You gentlemen investigate the rate structure in certain sections of the country as it relates to manufactured products, and then if any relief is needed, grant that relief to such products.' " (Cong. Rec., Vol. 84, part 9, pp. 9872, 9873.)

None of this decisive legislative history was mentioned y the Commission when it found that the legislative his- ory supports its construction of the legislation as an in- rease in its powers and a change in the effect to be given the elements of rate-making.

The reasons why the Committee on Interstate and oreign Commerce had refused to recommend a change the rate-making rules and had instead recommended e passage of the Ramspeck Resolution were explained Representative Halleck, a member of that Committee, a passage to which the Commission did not refer, as llows:

"Mr. Halleck. Mr. Chairman, it occurs to me that there are some things in connection with this amendment that should be said. In the course of our hearings the committee was asked to hear certain people

—I do not say they were all from the southern sections, but I would say they were predominantly from those sections—who for years have been complaining about alleged freight-rate discriminations against them. The committee took time in the course of the hearings to hear them. When we started the hearings there had been proposals in the Congress which would in effect have put the Congress of the United States into the business of making rates. When the rate experts representing those sections appeared before our committee, every one of them admitted without exception, when questioned, that they did not expect the Congress of the United States to make the rates; that that was a power properly vested in the Interstate Commerce Commission and that it should remain there. The last thing in the world they wanted was that the Congress undertake to make the rates. Why, that is one of the most complicated matters of which you can conceive. • • •

"Our hearings disclosed that there are really no discriminations in regard to freight moving from north to south and from south to north. *You can find differences in the freight rates within some sections of the country and official territory, but people will fairly explain to you that those differences result from differences in the density of traffic and a lot of other situations that do not really involve unjust discriminations.*" (Cong. Rec., Vol. 84, Part 9, p. 9879.)

Thus the House, as well as the Senate, made it abundantly clear that it did not intend to bring about the equalization or uniformity of freight rates or to amend the Interstate Commerce Act so as to change the powers of the Commission with respect thereto. It did not broaden the powers of the Commission or increase its authority.

E.

THE LEGISLATIVE HISTORY OF THE TRANSPORTATION ACT OF 1940 SUBSEQUENT TO ITS ENACTMENT CONFIRMS THE FACT THAT THE ACT WAS NOT A DIRECTION FROM CONGRESS TO BRING ABOUT UNIFORMITY OF FREIGHT RATES.

The Transportation Act of 1940 created a Board of Investigation and Research for the study of various problems of transportation. On March 30, 1943, the Board submitted a "Summary Report on Study of Interterritorial Freight Rates" to the President, the Vice President, and the Speaker of the House of Representatives. That report reads in part as follows:

> "• • • If present class-rate levels and relationships meet the test of reasonableness under the present act, and are in all respects lawful, it does not follow that all other levels or relationships would be unlawful. *If Congress is of the opinion that it is desirable, in the public interest, to have class rates throughout the country on as nearly uniform a basis as is consistent with transportation costs and the revenue needs of the carriers, it would be appropriate so to declare, and to direct the Interstate Commerce Commission to adjust rates in conformity with that policy.*[1]
>
> "It is important, however, that any adjustments in rates be brought about through the established agencies of control. Direct legislative prescription of rates is fraught with many difficulties and should be avoided. It is entirely fitting, however, and consistent with traditional methods of regulation, that Congress declare what policies it wishes to be observed in the regulation of carriers, and that it set up legislative standards and rules of guidance to be followed by the Interstate Com-

[1] It is plain from the evidence and findings in this case that if "uniformity" had been so interpreted by the Commission in this case, it would not have ordered the Western railroads to reduce their rates to the level that is just and reasonable for the low cost Eastern railroads.

merce Commission in the prescription of rates. Various provisions of the Interstate Commerce Act constitute such rules of guidance and standards of control. *Aside from the general provisions of the Act that rates must be just and reasonable, and not unduly preferential or prejudicial, there is nothing in the Interstate Commerce Act that expresses definitely any Congressional policy regarding regional rate levels and the structure of interterritorial rates. It is true that Section 3 (1) of the Interstate Commerce Act was amended in 1940 to include any 'region', 'district', or 'territory' within the scope of the prohibition against undue preference and prejudice. This amendment recognizes that regional differences in rate levels may possibly be discriminatory, but it is doubtful whether it changes the substance of the law."* (House Document No. 145, 78th Cong. 1st Sess., p. 35.)

Thus the Board of Investigation and Research, established by the Transportation Act of 1940, reported in 1943, during the progress of the Commission's investigation, that there was nothing in the statutes expressing any Congressional policy regarding regional rate levels except the long established standards that all rates must be just and reasonable and not unduly preferential or prejudicial. It is of interest to note that one of the three members of the Board was the first witness before the House Committee on Interstate and Foreign Commerce when the proposed uniform freight rate bills were being considered. He was in a unique position of familiarity with the legislative history.

After the report of the Board, legislation was again introduced in both houses of Congress in 1943 to change the rate-making standards and bring about uniformity of freight rates. Again the proponents of uniformity failed to obtain support from the other members and the bills in both houses failed to pass. (78th Cong., 1st Sess.; S. 947, S. 1124, H. R. 2378, H. R. 3172, and H. R. 3183.) Similarly,

in 1944 a bill was introduced and referred to the Committee on Interstate and Foreign Commerce to amend the Interstate Commerce Act by providing for a uniform scale of class rates for railroad freight for application throughout the country. (H. R. 3907, 78th Cong., 2nd Sess.) That bill provided that "all provisions of the Interstate Commerce Act, as amended, which are in conflict with the provisions of this section are hereby repealed." That bill, like all the other bills for the establishment of uniform class freight rates, was rejected.

But the Commission, in 1945, by construing the Transportation Act of 1940 as being a Congressional mandate to "bring about" equal rates, has done what Congress refused to do in 1939, 1940, 1943 and 1944, and has done it despite the fact that Congress itself recognized that the repeal of part of the Interstate Commerce Act would be necessary before such a change in the principles of rate-making could become lawful. The Commission felt constrained to follow the principles that Congress had refused repeatedly to adopt, and its conclusions were dominated at every step by its misconstruction of the amendments embodied in the Transportation Act of 1940.

F.

THE ORDER IS INVALID FOR THE SAME TYPE OF MISCONSTRUCTION THAT INVALIDATED THE COMMISSION'S DECISION UPON THE HOCH-SMITH RESOLUTION.

In a remarkable way history has repeated itself with respect to sectional demands upon Congress for transportation legislation favoring a particular section, the rejection of those demands by Congress coupled with the adoption of a resolution directing an investigation without changing the traditional rate-making standards, followed by the misinterpretation by the Commission of the

legislation as constituting a change in the basic law and as rendering unlawful rates which were theretofore lawful. In the previous case it was necessary for the Supreme Court to hold the Commission's order invalid. The present order is equally invalid and for the same reason.

In the agricultural depression of 1925, the representatives of the agricultural states pressed Congress to amend the rate-making provisions of the Interstate Commerce Act to compel the establishment of lower rates for agricultural products. Congress refused to make such a change for the same reasons that it refused in 1940 to change the rate-making standards to eliminate territorial differences in rates. In response to the request for legislation, however, it enacted the Hoch-Smith Resolution directing the Commission to investigate to determine whether the rates were unjustly discriminatory or unduly preferential "as between the various localities and *parts of the country*," and to correct any defects so found to exist, just as in 1940 it directed the same type of investigation of rates between points in different territories of the country or within those territories. In fact, the Ramspeck Resolution is a direct paraphrase of one paragraph of the Hoch-Smith Resolution under which the present class rates were prescribed.[1]

[1] "That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. * * *" (Hoch-Smith Resolution, 43 Stat. 801, 49 U. S. C. Sec. 55.)

The Commission misinterpreted the action that Congress had taken in response to that earlier sectional demand as having been a submission to that demand. It therefore entered upon the investigation which had been directed and, interpreting the direction as a mandate to change the existing rates, held the rates on deciduous fruits to be unlawful and ordered a reduction. It made clear in its report that it thought the legislation had changed the law and that it was proceeding on that basis although it also held the rates to be unreasonable under Section 1. There again, the exact parallel exists, for the Commission has now held that the legislation of 1940 gave it a mandate not just to investigate and test the validity of the rates which the Commission had just prescribed, but to hold those rates unlawful and to make new rates that would be uniform in the different parts of the country. And the Commission has placed its ultimate finding upon Sections 1, and 3(1) of the Act while at the same time making it manifest that it was testing the reasonableness and validity of those rates by a supposed requirement of uniformity and that it believed that it was limited in giving any effect to the recognized rate-making principles because of its construction of the 1940 legislation. In that case, as in this one, the Commission interpreted the legislation that Congress had adopted as containing the standards and directions which were in fact contained only in the bills that Congress had refused to adopt. This Court held unanimously that in such circumstances the Commission's order must be set aside. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658 (1930). The Court said in part:

> "True, in both the original and supplemental opinions it is said that the existing rates are unreasonable, but the opinions taken as a whole show that this means the rates were deemed unreasonable under the joint resolution when construed as the commission construed it, and not that they were deemed unreasonable

under § 1(5) or § 3(1) of the Interstate Commerce Act. Throughout the opinions it is manifest that the commission was testing the reasonableness and validity of the rates by considerations not applicable under those sections but believed by it to have been brought into the problem by the resolution.

"*The joint resolution is the outgrowth of several measures proposed in Congress but not adopted.* Some of the measures may have been designed by their proposers to make real changes in existing laws relating to transportation rates. But they are not before us. The measure that is before us is the joint resolution which emerged from the legislative deliberations and proceedings. * * *" (p. 266)

"We are of opinion that the commission's construction can not be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law." (p. 268)

It may be emphasized again that although the Commission in that case, as here, had found the rates to be unreasonable, the Court gave controlling weight to the fact that the Commission's construction of the law was revealed by its discussion of the applicable considerations and by the import of the Commission's discussion of the resolution in its report. Similarly, here, the fact that the Commission in its so-called ultimate findings has placed the decision upon a holding that the rates, which the Commission itself had fixed, constitute a violation of Section 1 and of Section 3(1) is not controlling, since it is manifest that the Commission was testing the reasonableness and validity of the rates by considerations of a supposed Congressional approval of uniformity of freight rates and repeal or material qualification of the standards of rate-making.

The order should be set aside because of the Commission's misconstruction of the law. The Commission, if it wishes, may then proceed to consider the reasonableness and validity of the rates under the lawful standards of rate-making, as Congress intended, rather than under a supposed compulsion to do everything possible to bring about uniformity in response to a non-existent Congressional mandate.

G.

THE DISTRICT COURT ERRED IN HOLDING THAT THE INTERSTATE COMMERCE ACT PRIOR TO 1940 LEFT THE COMMISSION FREE TO ESTABLISH UNJUSTLY DISCRIMINATORY RATES AMONG THE TERRITORIES AND THAT THE 1940 AMENDMENTS EMPOWERED AND REQUIRED THE COMMISSION TO HOLD UNLAWFUL THE TERRITORIAL RATES PREVIOUSLY PRESCRIBED AND TO REQUIRE UNIFORM RATES DESPITE THE DISPARITY IN TRANSPORTATION CONDITIONS.

The District Court held that the Commission was correct in its views of the effect of the 1940 legislation and that the changes wrought by that legislation were so sweeping that the comprehensive systems of class rates, which the Commission had established only recently before 1940 and which were clearly lawful, until that legislation, thereby became unlawful. It held that the factors for determining the lawfulness of rates had been changed by the addition of "new factors," the effect of which was so revolutionary as to make unlawful all the established class rates east of the Rockies. The Court said:

> "We may, indeed, take it for granted that they [the class rates] were lawful previous to the amendment since they had been in the main the result of comparatively recent investigations and orders of the Commission." (R. 1433.)
>
> "We think Par. 3(1) as thus amended *does add new factors to be taken into account* by the Commission in

determining, under the old and well recognized principles which were *before* guides to decision in such matters, whether existing rates are unlawful. These new factors are whether such rates are unjustly preferential, prejudicial and discriminatory as between regions, districts or territories; and, in our opinion, Par. 3(1) now empowers the Commission to find such rates unlawful *even though they would have been lawful in the light of all relevant considerations before the amendment.*" (R. 1432-1433.)

The Court's interpretation, therefore, is that although the Commission itself had fixed all the class rates east of the Rockies, it had so fixed them as to discriminate unjustly to the undue prejudice of the Western territories and the undue preference of the Eastern Territory. That supposedly unjust discrimination, according to the Court, was perfectly lawful under the Interstate Commerce Act because that Act, until 1940, freely permitted the Commission to discriminate unjustly among the several territories. Then, in 1940, "new factors" were added empowering the Commission to hold those rates to be unlawful.

We submit that the District Court's interpretation of the Interstate Commerce Act as it stood prior to 1940, and of the decisions of the Commission under that Act, is erroneous, and that such a doctrine of the supposed right of the Commission or the carriers to discriminate unjustly among the various territories of the country would have received short shrift in the courts. The very investigations which resulted in the fixing of the class rates for the several territories were conducted by the Commission pursuant to the direction in the Hoch-Smith Resolution "to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unjustly preferential * * * *as between the various* * * * *parts of the country* * * * and to make, in accordance with law, such changes * * * of rates and charges

as may be found necessary to correct any defects so found to exist." (43 Stat. 801, 49 U. S. C. Sec. 55.) In establishing the class rate structure in the West, *Western Trunk-Line Class Rates,* 164 I. C. C. 1 (1930), the Commission considered and rejected the requests of some interests for uniform rates on the following ground: "Recognition must be given to the rate relations with adjoining territories, differences existing within w.t.l. territory as evidenced by conditions customarily considered in determining rate levels, and the revenue requirements for w.t.l. respondents." (p. 198) "Class rates in w. t. l. territory appreciably higher than in official territory are justified also by the nature and volume of the articles moving under such rates in the respective territories. Many articles handled in enormous volume pay class rates in official territory, whereas in w. t. l. and southern territories they enjoy commodity rates lower than the corresponding class rates. This in a large measure will account for and warrant relatively low class rates in official territory as compared with other territories." (p. 202) In the contemporaneous *Eastern Class Rate Investigation,* 164 I. C. C. 314 (1930), the Commission said:

> "Attention of the parties was called to this resolution early in the proceeding, and they were asked to keep it in mind in the presentation of evidence. Under the mandate of that resolution we have found that there should be an increase and readjustment of the class rates in western trunk-line territory, but the shippers in that territory opposing such an increase have contended that it would create an unfair disparity between the class rates in that territory and those in effect just across the territorial border in official territory. *This circumstance affords another reason why the instant case can not properly be decided from the narrow standpoint of conditions in the eastern district alone as they were in 1925. In our preliminary report we particularly called attention to the relation between the rates here involved and those in other territories.*" (pp. 390-391)

It is thus apparent, we submit, that the Commission, in the years before the 1940 legislation, and in the very investigations that established the class rates in Eastern Territory and in the several zones of the Western territories, entertained no notions that it was free to establish class rate structures that would be unjustly discriminatory, and, on the contrary, was at pains to take evidence, hear complaints and carefully decide the cases on the established standards of rate-making for the purpose of preventing any such discrimination. The inclusion in 1940 of the express words "region, district, territory" in Section 3(1) of the Interstate Commerce Act did not constitute any substantive change in the law. The District Court erred in holding that the Commission had been free to discriminate unjustly among the several territories prior to 1940 and had actually done so in establishing the great class rate structures. That court, and the Commission, also erred in holding that the 1940 changes had made unlawful the territorial differences in rates. That error is basic—it caused the Commission to decide that the 1940 law made unlawful the territorial rate differences that it had established pursuant to the proper rate-making principles based on traffic and transportation conditions, and that Congress was requiring and authorizing it to bring about uniformity. Such a basic mistake of law, we submit, renders the order void.

IV.

IN REQUIRING RATE UNIFORMITY WITHOUT ANY CONSIDERATION OF ITS EFFECT UPON THE WESTERN CARRIERS, THE COMMISSION ACTED ARBITRARILY AND WITHOUT DUE PROCESS.

The elementary principle that consideration must be given to the effect of rates on the "carrying companies" was recognized by this Court long before that admonition was written into Section 15a of the Interstate Commerce Act. In *Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 197 (1895) the Supreme Court, describing the considerations which should govern the Commission in inquiring into the unreasonable and discriminatory character of rates, stated that:

> "all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act." (p. 219.)

The gross failure of the Commission in this proceeding to give any consideration to "the welfare of the carrying companies" makes its action so arbitrary as to amount to a denial of due process.

Not the class rates alone, but substantially the whole rate structure in the West is the handiwork of the Commission. At the time the Commission entered upon this investigation every major railroad, except one,[1] operating exclusively in these two western rate territories,[2] was in

[1] The Burlington, which is owned jointly by the Great Northern and the Northern Pacific, is the only major road operating exclusively in Western Trunk Line and Southwestern rate territories which has not been in bankruptcy or receivership within the last ten years.

[2] Western Trunk Line, and Southwestern rate territories.

bankruptcy or receivership. For many years those roads had been forced to maintain a rate structure which did not permit the earning of a fair return on the basis of the Commission's own valuation of their properties, and in the discharge of its duties under Section 77 of the Bankruptcy Act, the Commission was even then in the process of declaring the whole of their preferred and common stocks to be without value. But the report, while holding the class rates in the West to be too high, does not note by so much as a passing word the contemporary loss of these great properties to their owners. Driving for rate uniformity, the Commission proceeded implacably to its determination that the entire class rate structure in the West, which, as we shall show, it had only recently found to be too low, should now be reduced by amounts ranging up to 43.5%.[1]

We ask this Court to consider the recent history of the rate structure in the West, including the class rates, and to view, in that perspective, the present action of the Commission, "as affecting the welfare of the carrying companies." We ask the Court to do this, not to determine whether or not the decision is a wise one, but to determine whether or not it is an arbitrary and unlawful one.

The Western roads, and particularly those operating in Western Trunk Line Territory, were experiencing the adverse effect of a constantly declining rate level[2] as early as 1925, and in that year filed petitions with the

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[1] For comparison between the rates in effect when the Commission made its order herein (Report, Appendix 8, R. 359) and rates found lawful by the Commission (Report, Appendix 10, R. 381), see Appendix A, this brief, page 191.

[2] As shown, *infra*, p. 173, the revenue per ton mile of the roads in the Western District, which is the average price at which they are obliged to sell their product, declined steadily from 1921 to 1945.

Interstate Commerce Commission seeking authority to make a five percent increase in their rates on the grounds that (1) since the passage of the Transportation Act, 1920, they had not earned a fair return upon the value of the properties, (2) that they were finding it impossible to maintain the adequate transportation system contemplated by Congress, and (3) that because of the confiscatory rate of return under which they were operating their financial condition was precarious. (*Ex Parte 87, Revenues in Western District,* 113 I. C. C. 3, 8 (1926).) Authority to increase the class rates was specifically sought.[1]

The Commission entered upon an investigation of the rate level, as prayed, and rendered its report July 14, 1926,[2] finding that:

> "In the northwestern region and in western trunk-line territory the revenues of certain of the important carriers have not yielded 5.75 per cent [the rate of return then deemed reasonable by the Commission] upon any rate bases that can reasonably be adopted in advance of a final determination of present values for rate-making purposes. *The least favorable conditions in the district, so far as carrier revenues are concerned, appear to exist in western trunk-line territory.*" (p. 37).

Nevertheless, the Commission denied the modest increase of 5% then sought, (without prejudice, however, to the proceeding referred to below, 113 I. C. C. 39) on the ground

[1] "During the course of the hearings in *Ex Parte 87,* on November 19, 1925, they [the Western roads] filed with us a petition, *Ex Parte 87 (Sub-No. 1)* praying for a complete revision of the chaotic class-rate structure within w. t. l. territory, to the end also that the revenues of the carriers in that territory 'may be increased to more nearly yield a fair return.'" (*Western Trunk Line Class Rates,* Docket 17000, Part 2, 164 I. C. C. 1, 11 (1930).)

[2] *Ex Parte 87, Revenues in Western District,* 113 I. C. C. 3 (1926).

that "so far as the major portion of the western district is concerned no financial emergency exists" (p. 37). Section 15a of the Act did not condition the right to rate relief upon the existence of an "emergency", and later when the emergency nature of the situation became unmistakable and extreme, successive petitions for rate increases were denied.

Thereafter, in a proceeding known as *Rate Structure Investigation*, Docket 17000, *Part 2, Western Trunk-Line Class Rates*, the Commission, (having recognized that the "least favorable conditions in the district, so far as carrier revenues are concerned, appear to exist in Western Trunk Line Territory," *Ex Parte 87, supra*), entered upon an investigation into the lawfulness of "all class rates • • • between points within western trunk line territory, and between that territory on the one hand, and on the other official territory as well as Illinois, and southern territory." The Commission concluded the investigation with its report of May 6, 1930, 164 I. C. C. 1, and the revised class rate structure became effective December 3, 1931.

In that proceeding, one of the most comprehensive and exhaustive investigations ever conducted by it,[1] the Commission, in a 300 page report, prescribed the class rate structure for Western Trunk Line Territory. Those rates were aligned with the class rates prescribed contemporaneously, and virtually in the same proceeding,[2] for applica-

[1] In its report in the instant case, the Commission stated that the record in that proceeding embraced 18,300 pages of testimony and 1700 exhibits. (R. 294.)

[2] "At the last hearing, official-territory respondents made a motion to the effect that the action on the interterritorial all-rail rates be deferred until the respective intraterritorial rates in these proceedings and in the *Eastern case* have been finally determined. [*Eastern Class Rate Investigation*, 164 I. C. C. 314 (1930).] • • • *Since both proceedings are being considered and disposed of at approximately the same time, no action is needed on this motion.*" (164 I. C. C. 1, 206-207) (See also pp. 160-162, this brief.)

tion in Eastern Territory. It should be emphasized that they were established also as a component and properly related part of the entire rate structure in the West, as revised by the Commission in *Rate Structure Investigation, Docket 17000* initiated under the Hoch-Smith Resolution. By that resolution the Commission was directed:

> "• • • to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing burdens, or giving *undue advantage as between the various localities and parts of the country,* the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist."
>
> It was further directed: "In making any such • • • redistribution [to] give *due regard* • • • *to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation.*" (Pub. Res. No. 46, 68th Cong., 43 Stat. 801, 49 U. S. C. Sec. 55.)

Pursuant to that resolution the Commission prescribed thirteen major rate structures,[1] the investigation and

[1] *Part 2—Class Rates,* 164 I. C. C. 1 (1930).
Part 3—Cotton, 165 I. C. C. 595 (1930).
Part 4—Oil, 179 I. C. C. 19 (1931).
Part 5—Furniture, 177 I. C. C. 5, (1931).
Part 6—Iron & Steel, 155 I. C. C. 517 (1929).
Part 7—Grain, 164 I. C. C. 619 (1930); 205 I. C. C. 301 (1935).
Part 8—Cottonseed, 188 I. C. C. 605 (1932).
Part 9—Livestock, 176 I. C. C. 1 (1931).
Part 10—Hay, 195 I. C. C. 461 (1933).
Part 11—Sand & Gravel, 155 I. C. C. 247 (1929).
Part 12—Non-Ferrous Metals, 204 I. C. C. 819 (1934).
Part 13—Salt, 197 I. C. C. 115 (1933).

revision of the class rate structure in the Western Trunk Line Territory being designated as Part 2 in the series.

The resolution also directed the Commission to establish on the products of agriculture including livestock, "the lowest possible lawful rates compatible with the maintenance of adequate transportation service." In response to that direction the Commission ordered widespread and drastic reductions in those rates, and that action fell with particular severity on the granger roads of the West.[1] In the test year (1939) 31.3% of the revenue net ton miles in the Western District were products of agriculture, livestock and products, as compared with 14.5% for the Eastern District. (Report, R. 227.) It cannot be too strongly emphasized that the present class rate structure was created as an integral and interdependent part of that general redistribution of the whole rate structure; and is now condemned without any reference to that fact, or any consideration of its effect upon the Western roads.[2]

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[1] In *Increased Railway Rates, Fares and Charges, 1942, Ex Parte 148,* 248 I. C. C. 545 (1942), the Commission, adhering to the direction of the Hoch-Smith Resolution to maintain the lowest possible lawful rates on agricultural products, contrasted the effect of this policy respectively on the Eastern and Western roads as follows:

> "The situation as to relative strength of the granger roads and those properly treated as principally agricultural rail lines is the reverse from that of the principal bituminous coal and iron ore carrying lines in general. The former are relatively weak, and their revenues have no such cushion as the latter against the wage and other increases here considered. Relatively, the agricultural lines do not transport as much high-grade, manufactured traffic as the other roads, not primarily coal carriers."

[2] We ask the Court to observe that the Ramspeck Resolution under which this proceeding was conducted, directs the Commission to investigate the rates on "agricultural

In its report in the *Western Trunk-Line Class Rate Case*, 164 I. C. C. 1, Part 2 of that investigation, the Commission stated that, as in *Ex Parte 87*, the respondents contended that the roads operating in Western Trunk Line Territory have not earned a fair return for a long period of years, notwithstanding honest and efficient operation, and an adequate volume of traffic. (pp. 58-59) The report continues as follows:

> "A witness for the 'security holders' committee for a fair return,' stated that as a result of the earnings situation various bonds of roads operating in w. t. l. territory have been stricken from the list of legal investments for savings banks and trustees; and that as a result of the credit situation w. t. l. territory is a most unpopular place in which to invest money, many institutions, insurance companies, and savings banks having passed resolutions forbidding their officers to invest additional money in that territory. Another bank official testified that a canvass of 131 banks, members representing 90 per cent of the New York Association, disclosed the fact that for the 4-year period ended with 1926, their investment in all railroad bonds increased $108,538,000, but in the eight principal w. t. l. railroads decreased $4,807,000." (pp. 61-62)

After discussing the financial condition of the Western Trunk Line roads the Commission, referring to its decision in *Ex Parte 87*, said:

> "It was declared that 'the least favorable conditions in the district, so far as carrier revenues are concerned, appear to exist in western trunk line territory,' 113 I. C. C. 37; and *that declaration is*

commodities" as well as on "manufactured commodities" "for the purpose of determining whether said rates are unjust and unreasonable * * in their relation to each other and to enter such orders as may be appropriate." (54 Stat. 902, 49 U. S. C. Sec. 3, note.) The Commission has made no such determination.

amply borne out by the record in these proceedings." (pp. 176-177)

The report continues:

"The carriers as a whole in w. t. l. territory are in poor financial condition. • • • Their condition is not due to inefficient or uneconomical operation of these railroad properties, except possibly as to certain passenger operations mentioned in subchapter E-2; nor, so far as volume of traffic is concerned, to a prolongation of the business depression of 1921." (p. 177)

"Class-rate traffic is of such a nature that it may well be expected to sustain rates relatively higher than other business, giving due regard to the rate levels in adjoining territories and to what the traffic will bear." (p. 181)

• • • • •

"Any future general improvement in the financial condition of w. t. l. respondents, with a substantial increase in the average rate of return on their property investment is no valid reason for denying them increases on their class-rate traffic. The rates prescribed herein are intended to be sufficiently high to yield a relatively greater amount of profit than class-rate traffic now contributes to the revenues of w. t. l. respondents.

"*Finding 1.—We find that the general level of w. t. l. class rates is relatively low and that an increase is justified to the level resulting from the bases provided in subsequent findings herein; and that w. t. l. respondents are entitled to the increased revenues expected to be yielded by the increased class rates herein prescribed because of their financial condition, and because this class-rate traffic can reasonably bear such rates.*" (p. 182.) (Italics by the Commission.)

With full knowledge, therefore, of the critical financial position of the railroads in this Western Territory, and

with due consideration of the rate levels in the adjoining territories, the East and the South, as required by the Hoch-Smith Resolution, and as an integral part of a broad readjustment of the entire rate structure, the Commission prescribed the class rate structure in Western Trunk Line Territory, stating as follows:

> "In determining upon the measure of the class-rate distance scales within w. t. l. territory, two major objectives must be kept in mind, namely (1) to arrive at maximum reasonable class rates upon a level commensurate with the nature of this traffic and the value of the service, taking into consideration respondents' revenue needs; and (2) to arrive at appropriate relations with the rate levels in adjoining territories." (p. 201)
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> • • • • •
>
> "*Class rates in w. t. l. territory appreciably higher than in official territory are justified also by the nature and volume of the articles moving under such rates in the respective territories.* Many articles handled in enormous volume pay class rates in official territory, whereas in w. t. l. and southern territories they enjoy commodity rates lower than the corresponding class rates. *This in a large measure will account for and warrant relatively low class rates in official territory as compared with other territories.*" (p. 202)

It developed later, as recorded in a supplemental report in the same proceedings issued in 1934[1] that the Commission had believed that its revision of the class rate structure would produce an annual increase in revenue of ten to twelve million dollars. The carriers' evidence showed at the subsequent hearing that an annual increase of only about one million dollars had actually been realized. In its supplemental report the Commission said:

> "This further record fully sustains respondents' claim of need for increases in their net revenues from

[1] *Western Trunk-Line Class Rates*, 204 I. C. C. 595 (1934).

all traffic. It is obvious that the financial condition of the western trunk-line carriers has not improved since the original decision, but that *on the contrary their operations have failed by ascending amounts to yield a fair return.* It is equally obvious that the difference cannot be made up alone from the class-rate and related traffic herein under consideration, which represents only a small proportion of respondents' total tonnage. However, within the bounds of reasonableness, and taking into account the lawful interests of the shipping public, this traffic should contribute as much as possible toward that end.

"The results of the 1932 traffic test as portrayed by respondents cannot be accepted at their full face value, but they are convincing that the increases yielded by the readjustment under review are not as great as anticipated." (204 I. C. C. 595, 655)

It was plain to the Commission, therefore, that the basic class rate structure was on a lower level in relation to the general rate structure, and lower in respect to its contribution to the urgent revenue needs of the Western roads, than the Commission had intended.

Even at the time when the Commission believed that its new class-rate structure would increase annual revenues by ten to twelve million dollars, it recognized that the revision would fall short of producing the additional revenue needed by the lines in that territory, as follows:

"It is clear that the revenues obtainable from the increases in class rates herein authorized will not augment the earnings sufficiently to produce a fair return upon the carriers' property in the western group as a whole." (164 I. C. C. 1, 181)

But the deficiency in earnings, resulting, both from the Commission's miscalculation of the revenue to accrue from the revised class rate structure, and from the inadequacy of the revenue from other traffic as recognized above, was not made up. On the contrary, the rate level of the rail-

roads of the Western District continued to go down as revealed by the decline in revenue per ton-mile as shown below:

Year	Revenue Per Ton-Mile (Cents)	Year	Revenue per Ton-Mile (Cents)
1918	0.944	1932	1.145
1919	1.098	1933	1.077
1920	1.170	1934	1.050
1921	1.422	1935	1.041
1922	1.292	1936	1.017
1923	1.227	1937	0.979
1924	1.208	1938	1.039
1925	1.195	1939	1.021
1926	1.187	1940	0.982
1927	1.179	1941	0.946
1928	1.166	1942	0.961
1929	1.162	1943	0.966
1930	1.149	1944	0.972
1931	1.136	1945	0.982

SOURCE: Revenue per ton-mile from I.C.C. Annual Reports of corresponding years except 1945 which is from the I.C.C. preliminary abstract of that year.

Although the Commission recognized that the Western roads were earning far less than the return deemed necessary to supply adequate transportation, and that the financial condition of many was becoming precarious, they were repeatedly denied authority to make rate increases sufficient to check the decline in ton mile earnings. Following the request of the Western roads to increase rates by five per cent, which was denied, and beginning about the time of the revision of the *Western Trunk Line Class Rate* Case, *supra*, in which the Commission recognized the inadequacy of their earnings, the roads filed a series of petitions seeking authority to increase their rates, first by fifteen percent and then by ten percent. All of these petitions were denied. The Commission allowed certain surcharges

averaging about 2.5% (*Ex Parte 103*, 191 I. C. C. 361, 365 (1933)) for a short period in lieu of the fifteen percent increase requested, and later, small, so-called emergency charges were permitted, but only from March 18, 1942, until May 15, 1943, in lieu of the ten percent increase sought in successive petitions.[1]

The Commission's denial of any substantial relief in those proceedings must be viewed in the light of the fact that the petitioning roads were struggling to save themselves from general bankruptcy, that they were not earning a fair return upon the Commission's own value of their properties, that, through various rate revisions, the rate level was constantly declining, notwithstanding tremendously increased costs and investment, that railroad management believed that the traffic could and should bear higher rates, and that the increases sought would not put the rate level on a reasonable maximum basis, but were only calculated to maintain solvency. The small advances permitted by the Commission were not sufficient to arrest the continued downward trend in the rate level, as shown above.

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[1] *Revenues in the Western District, Ex Parte 87*, July 14, 1926, 113 I. C. C. 3;
Fifteen Percent Case, 1931, Ex Parte 103, October 16, 1931, 178 I. C. C. 539;
Fifteen Percent Case, 1931, Ex Parte 103, March 7, 1933, 191 I. C. C. 361;
Emergency Freight Charges, 1935, Ex Parte 115, March 26, 1935, 208 I. C. C. 4;
General Commodity Rate Increases, 1937, Ex Parte 115, October 19, 1937, 223 I. C. C. 657;
Fifteen Percent Case, 1937-1938, Ex Parte 123, March 8, 1938, 226 I. C. C. 41;
Increased Railway Rates, Fares and Charges, 1942, Ex Parte 148, March 2, 1942, 248 I. C. C. 545, April 6, 1943, 255 I. C. C. 357; November 8, 1943, 256 I. C. C. 502.

About 1935, the continued decline in the earnings of the Western roads, and in the rate level in the West, a trend which the Commission had greatly accelerated by reducing the rates on agricultural products under the Hoch-Smith Resolution, and had then refused to arrest by permitting the measure of rate increases repeatedly sought, produced its inevitable result. The major roads in Western Trunk Line and Southwestern Territories found it impossible to meet interest requirements, and began to go into bankruptcy. By the time the Commission entered upon this investigation of the class rates, more than fifty-eight thousand miles of railroad in the West were in the hands of the courts, and, with one exception, this included every major road which was forced to rely entirely on revenue derived from operations in the two western rate territories here involved.

The higher rate level in the West than in the East and South was not sufficient to sustain the greatly higher costs of operation in that territory, and the incidence of bankruptcy was markedly heavier in the West. The statement below compares the Class I mileage in bankruptcy or receivership in the several rate territories, *inter se*, and that in the Western District with that for the United States as a whole.

	Mileage Operated Under Receivership or Trusteeship Within Last 10 years[1]	Percent Western District Mileage of Eastern, Southern and United States
Western District	58,407	—
Eastern District	9,831	594%
Southern District	9,346	625%
United States	77,584	75%

[1] Percent bankrupt mileage of average mileage operated in 1945 in each territory: Western District, 45.23%; Eastern District, 17.55%; Southern District, 21.57%; United States, 33.96%. Source, the official reports of the Interstate Commerce Commission; see Appendix B this brief, page 192.

During the course of this investigation of the class rates in the West, which was initiated in 1939 and completed in 1945, the Commission, acting under Section 77 of the Bankruptcy Act, promulgated plans of reorganization for substantially all the bankrupt mileage in the West. In those proceedings, as shown in its official reports, the Commission found all the outstanding preferred and common stocks of the carriers affected, to be without value, and those issues, together with certain junior bonds or debentures similarly eliminated, aggregated, in principal amount, more than one billion dollars. Of the fifteen roads named below, the mileage of twelve lies wholly or principally within Western Trunk Line or Southwestern Territories.

Mileage		Principal Amount of Preferred and Common Stocks Eliminated
1,512	Chicago Great Western	$ 74,646,050[1]
2,620	Denver & Rio Grande	16,445,600
958	Alton Railroad	17,000,575
11,126	Milwaukee Railroad	224,410,294
8,290	Chicago and North Western	180,835,300
8,333	Rock Island	128,892,511
1,536	M. & St. L.	10,972,600
3,232	Soo Line	37,810,200
5,267	Frisco Railroad	114,701,526
10,480	Missouri Pacific System	151,504,443
1,784	St. Louis & Southwestern	37,079,700
1,392	Western Pacific	75,800,000
1,157	Wisconsin Central	27,392,200[2]
549	Duluth, South Shore	23,500,000[2]
164	Spokane International	4,200,000
58,400		$1,125,190,999[3]

The elimination of that vast property interest was not an innocuous bookkeeping adjustment. It meant that many thousands of ordinary people who owned the railroads which perform most of the class rate service in these two large western rate territories were losing their ownership at the very time the Commission was undertaking to appraise the lawfulness of the compensation received for that service. That grim fact hangs like a shroud over the action of the Commission in now ordering drastic reductions in the class rates, some to a basis below the out-of-pocket costs of the service, without any consideration of "the welfare of the carrying companies", or of the unmistakable

[1] Includes certain bonds.
[2] Examiners' report only.
[3] Exclusive of 300,000 shares of no par Common Stock of Denver & Rio Grande. The Commission's reports are shown in Appendix B, this brief, page 192.

demonstration that the existing rate structure had proved insufficient to cover the true cost of performing the service.

Petitioners earnestly ask the Court to compare the Commission's report in the proceeding in which it established the class rate structure in this territory (164 I. C. C. 1) with its report here. Read together, and in the light of what has happened since December 3, 1931, when the prior revision became effective, (the increase in costs and the bankruptcy of the Western roads) nothing could more clearly mark the desperate import of the present order to the Western Lines. The decisive point of the comparison, impressive though it is, is not that in the former report the Commission found that it should so increase the class rates in Western Trunk Line Territory as to produce ten or twelve million dollars more revenue annually, and having failed to do so, now drastically reduces the rates. The decisive thing which is demonstrated by a comparison of the two reports dealing with the same subject matter, is that the Commission has here repudiated the governing and authoritative standards of rate-making which it had recognized, in principle, for fifty years. Squarely confronted with the fact that because of their greatly higher costs of operation, substantially all the carriers in this Western Territory had become bankrupt under a level of rates substantially above that in the East, but without the slightest reference to that fact, the Commission, relying on something which it called "the history of the times when [1940] the law was amended," (Report, R. 306) found unlawful all the class rates previously prescribed by it in the West, exactly in the measure that they exceed those prescribed for the East and South.

The explanation faintly advanced by the Commission for this complete break with the past is that it was not until the 1940 amendments that the Commission was under any

duty properly to align rates between the various sections of the country. It cannot be too strongly emphasized therefore, that in establishing the class-rate structure in the West, which it now condemns, the Commission was proceeding in stated compliance with the plain, positive directions of the Hoch-Smith Resolution. By that resolution the Commission was required:

> "* * * to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly prejudicial, *thereby imposing undue burdens, or giving undue advantages as between various localities and parts of the country,* the various classes of traffic, and * * * to correct any defects so found to exist. In making any such change, adjustment or redistribution the commission shall give *due regard * * * to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation.*"[1]

In compliance with the mandate of that resolution to remove any discrimination as between the "various localities and parts of the country" in such manner as to promote the "natural and proper development of the country as a whole" and to do so with "due regard * * * to the maintenance of an adequate system of transportation," the Commission discussed at length in its report, among other factors, the revenue plight of the Western roads and the necessity that they obtain maximum earnings from class rate traffic. Traffic and transportation conditions which had always been recognized to be a governing factor in rate-making were fully weighed. The Commission found and stated that the increased revenue which it then believed should be realized from the rates prescribed on class traffic would not produce the fair return to which the

[1] Pub. Res. No. 46, 68th Cong., 43 Stat. 801, 49 U. S. C. Sec. 55.

carriers were entitled, and that additional revenue must be sought elsewhere.

Thereafter the Commission recognized that it had failed to produce from the class rate traffic the measure of revenue which it intended. Nevertheless the general rate increases necessary to prevent default were not permitted, and the result was bankruptcy for most of the railroads serving these two Western rate territories.

An assumed requirement of regional rate uniformity has completely changed the Commission's conception of the governing standards of rate-making. In striking contrast to its former report, the Commission leaves no doubt here that the factors deemed controlling in this particular proceeding do not include a consideration of the effect of a rate structure upon the revenue needs of the carriers which must maintain it, as directed both by Section 15a and the Hoch-Smith Resolution. It is thought sufficient under this new concept of rate-making to confirm the existence of the higher cost of the service in the West and then to ignore it. Why the rates must be the same when the cost of the service is different the Commission does not venture to explain.

The Western roads having failed to meet their higher costs and sustain their solvency on a rate structure substantially higher than the rate level in the East and South, the Commission, without the barest reference to that condition, concludes that the class rates in the West must be reduced as much as 43.5 percent in order to place them on the same level as the rates in the East and South. (Present rates, Appendix 8, and permanent basis found lawful, Appendix 10, Report, R. 361, 381.) It does so, moreover, in reliance on the 1940 amendments and various economic or sociological considerations of the widest generality applying as much, or as little, to all traffic as to class traffic, and

notwithstanding the evidence of its Cost Section that to make rates on all traffic in the West on the Eastern level would reduce revenue of the Western roads by $183,000,000 for the test year, 1939, an amount in excess of their total net railway operating income for that year. (Ex. 196, p. 15, R. 11373; offered at R. 4352.) In defiance of its own showing that the cost of performing the service in the West greatly exceeds that in the East and South, the Commission declared that the rates for the service must be the same. It makes no findings which support that conclusion and points to no evidence which could conceivably sustain it.

One of the extraordinary features of this case was the fact that only three shippers in all the West appeared to testify in this protracted investigation. One did not ship on class rates, and as to the other two the Commission states, "neither complained that the rate adjustment had discouraged or barred their enterprises from locating where they are." (Report, R. 288.) It is significant that while finding a place in its report for a discussion of the testimony of those three shipper witnesses, the Commission is silent as to the many thousands of persons who were then in the process of losing their ownership of the Western roads under the rate structure prescribed by the Commission, and wholly ignores the bearing of that condition on the adequacy of the existing rate level.

The Commission's conclusion is so arbitrary, so lacking in reason, and so contrary to the evidence and the law, as to deny due process.

V.

THE COMMISSION'S ORDER IS INVALID UNDER SECTION 3(1) OF THE INTERSTATE COMMERCE ACT BECAUSE THE CARRIERS DO NOT HAVE COMMON CONTROL OVER THE RATES.

Wholly apart from the foregoing considerations, the order is void because it purports to hold the Western carriers guilty of discrimination in favor of the Eastern shippers, despite the fact that the Western carriers have no control whatsoever over the rates paid by the Eastern shippers for shipments within that territory.

The Commission holds that the Western carriers are guilty of discrimination in violation of Section 3(1) because the rates for interterritorial traffic from the Western territories to Official Territory exceed the local intraterritorial rates maintained by the Official carriers. The Western carriers have no way of controlling the Official intraterritorial scale of rates, which the Commission, in this case, has held to be unreasonably low. The only connection of the Western carriers with the alleged unjust discrimination is their participation in the joint interterritorial rates.

In *Central R. R. Co.* v. *United States*, 257 U. S. 247 (1921), Mr. Justice Brandeis, speaking for a unanimous Court, held that mere participation in joint rates does not render carriers subject to the charge of discrimination on account of preferences extended to shippers by the other participating carriers. In that case, two eastern carriers joined with other carriers in through rates from the west to the east under which the privilege of creosoting in transit was allowed by the western roads. The two eastern carriers also served competing industries at other points on their own routes to the same destination, but allowed no

creosoting in transit to those shippers. The Commission found that the granting of the creosoting privilege to the through shippers was unjustly discriminatory and prejudicial to the local eastern shippers. This Court set aside the order. Mr. Justice Brandeis stated:

> "It is urged that, while the undue prejudice found results directly from the individual acts of southern and midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under § 3 to remove discrimination so practiced. See *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 144. But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one locality than to another similarly situated. *Penn. Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 208, 221, 222, 225. Compare *East Tennessee, Virginia & Georgia Ry. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 18. If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices or the cancellation of all joint rates could afford to carriers the assurance that they were not in some way violating the provisions of § 3. *What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920*, c. 91,

41 Stat. 456, *nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of § 3.*" (pp. 259-260.)

The same rule applies in this case, for although the Western carriers participate in the through rates, they have no control of or participation in the lower Official intraterritorial rates.

The decision above, together with other intervening decisions, was considered at length in *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627 (1933). That case, like the present proceeding, involved an allegedly unjust discrimination between through rates and local rates with which one of the parties to the through rates had no connection or participation. The Texas & Pacific Railway, an east-west line, runs through Texas and reaches New Orleans. It does not reach Galveston on its own lines, but was a party to through rates between Galveston and stations in Texas on the Texas & Pacific line. The Texas & Pacific maintained its own rates between New Orleans and certain of its Texas stations on an equality with the through rates between those stations and Galveston. Since Galveston and New Orleans were competing ports, Galveston claimed that it was being unjustly discriminated against, for the equalized rate to New Orleans covered a mileage longer than the mileage to Galveston. The Commission held that there was unjust discrimination and entered an order against the Texas & Pacific prescribing the minimum differentials for the future.

This Court set aside the order on two distinct grounds. The first was that Section 3(1) did not include discrimination against ports, on the ground that a port was a mere gateway for traffic and that the purpose of Section 3(1) was to protect against unjust discrimination as to origin or destination areas rather than to gateways. (The Act was amended in 1935 to include ports within Section 3(1).)

The other distinct ground of the decision may be best summarized by quoting one of the headnotes:

> "10. A carrier may not be held responsible for undue prejudice or preference to a locality in respect of rates unless both of the localities affected are upon its lines or it effectively participates in rates to both so that it may have the choice of raising one rate, lowering the other, or altering both. Earlier decisions distinguished. Pp. 646, 651."

The Court there gave the fullest consideration to the many cases on discriminations. It quoted and relied upon the *Central Railroad* case, *supra*. The portion quoted was part of the portion of Mr. Justice Brandeis' opinion in that case which is also set out above. Following the quotation from the *Central Railroad* case, Mr. Justice Roberts, for the majority of the Court, in the *Texas & Pacific* decision, said:

> "While this language was used with respect to circumstances differing from those here disclosed, it applies to the situation of appellants, who are by the Commission's order held responsible for what is not and cannot be the result of their own acts,—the level of the rates to the Texas ports." (p. 651.)

Similarly, in the proceeding now before this Court, the Western carriers are being held responsible for what is not and cannot be the result of their own acts, *i. e.*, the level of the intraterritorial rates in Official Territory. Indeed, the principle of the *Texas & Pacific* case applies here with greater force, for the Texas & Pacific itself maintained the local rate to New Orleans and was a party to the through rate to Galveston, whereas the Western carriers are only a party to the interterritorial through rate. This Court made the following full statement of the bases for its decision:

> "The classical case of discrimination in rates is presented where a single carrier serving two points

approximately equidistant from a common origin on the carrier's line, exacts unequal rates for the two hauls. Not only is the prejudice obvious, but equally so the ability of the carrier to abate it by raising the rates to the point enjoying the lower rates, or decreasing those to the point subject to the higher charge. The principle comprehends, as well, instances of joint rates where the same carriers participate in the rates to both points, and where the originating (or delivering) carriers are different, but the delivering (or originating) carriers are the same. So, too, a carrier may be responsible for preference or prejudice where it participates in one of several through routes between point of origin and the prejudiced destinations, although its own line may reach only one or neither of the latter, *St. Louis S. W. Ry.* v. *United States,* 245 U. S. 136, for the discrimination is brought about by the disparity of rates, and the order requiring its abatement necessarily runs against all the carriers parties to them. If one or more of the railroads whose lines make up the through route should refuse, upon an order to equalize rates, to afford one of the others a proper division of the rate, the latter may obtain redress from the Commission under § 15 (6). Where, however, a carrier whose lines reach, or which controls the rate to, one of the destinations, is a party to a joint rate to the other but cannot make or control the latter rate, or though it were to withdraw as a party thereto, or to cancel the rate, the discrimination would still continue—it cannot be held responsible, nor can any order to remove the prejudice run against it. This rule has been consistently applied in respect of export and import rates to the ports. The reason for the doctrine is that preference or prejudice can be found only by a comparison of two rates. If these are the rate of one carrier to point A and that of another to point B while a relationship of one to the other may be determined neither the first nor the second carrier alone can be held to have created the relation. Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate,

because the other's is higher or lower for the same service. *A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them.* Where an order is made under § 3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both. Compare *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; *United States* v. *Penna. R. Co.*, 266 U. S. 191; *Chicago, I. & L. Ry. Co.* v. *United States*, 270 U. S. 287, 292; *Minneapolis & St. L. R. Co.* v. *Peoria & Pekin U. R. Co.*, 270 U. S. 580, 582. The situation must be such that the carrier or carriers if given an option have an actual alternative.'' (pp. 648-650.)

It is significant that while Congress carefully considered the effects of the decision in *Texas & Pacific Ry. Co.* v. *United States*, and amended Section 3(1) to alter the rule as to ports, which was the first of the two distinct bases of the decision, it did not in any way alter the Act to change the rule followed by the Court for the second ground of the decision. That rule is controlling now as it was at the time of the *Texas & Pacific* decision, and the Commission's order is as improper in this case as it was with respect to the Texas & Pacific.

The District Court here held that the *Texas & Pacific* case does not apply because this is an order under Section 15(1) and because this Court had indicated in a footnote that no option need be given where an order is issued under Section 15(1). The District Court entirely overlooked the fact that where there is no common control of the disparate rates, there is no discrimination under Section 3(1) and therefore the question of what kind of order to issue should never arise in such a case as this.

The Commission, in considering this point, held that

its power under the Interstate Commerce Act "has been supplemented and reinforced, insofar as this particular investigation is concerned, by section 5(b) of the Transportation Act of 1940," and that "we are specifically empowered by that provision 'to enter such orders as may be appropriate for the removal of any unlawfulness which may be found to exist.'" (R. 466.) But the standard of "unlawfulness" is in the Act, not in the resolution. In respect to the rates under discussion there was in actual fact no discrimination, unlawful or otherwise, because the Western roads had nothing to do with the intraterritorial rates in the East. The provision on which the Commission relied was *not* an amendment to the Interstate Commerce Act; it was merely the Ramspeck Resolution for an investigation and did not change the substance of the law any more than did the earlier Hoch-Smith Resolution. The Commission has committed the same error here that it committed in its interpretation of the Hoch-Smith Resolution and here, as in *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658 (1930) this Court should set aside the Commission's order because of its misconstruction of a resolution of Congress. The rule of the cases cited above is applicable with full force here, and the Ramspeck Resolution has not repealed or changed it in the slightest degree.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the final decree of the court below should be reversed, and that the Commission's orders in *Class Rate Investigation, 1939*, I. C. C. Docket No. 28300 should be permanently annulled and set aside and their enforcement enjoined.

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February 10, 1947.

APPENDIX A.

Comparison between the present rates which were all prescribed by the Commission and the lower rates now found lawful by the Commission:

		Zone I		Zone II		Zone III	
Distance (Miles)	ICC 28300 Appendix 10 Scale (Rate)*	Appendix 8 Scale Rate**	% of App. 10 Scale	Appendix 8 Scale Rate	% of App. 10 Scale	Appendix 8 Scale Rate	% of App. 10 Scale
25	50	42	84.0	46	92.0	51	102.0
50	60	53	88.3	61	101.7	65	108.3
100	70	73	104.3	83	118.6	90	128.6
150	80	86	107.5	98	122.5	107	133.8
200	90	97	107.8	111	123.3	123	136.7
300	110	117	106.4	134	121.8	147	133.6
400	125	136	108.8	156	124.8	172	137.6
500	140	156	111.4	178	127.1	196	140.0
600	155	176	113.5	200	129.0	220	141.9
700	170	196	115.3	222	130.6	244	143.5
800	185	210	113.5	239	129.2	263	142.2
900	199	226	113.6	256	128.6	282	141.7
1000	213	240	112.7	273	128.2	300	140.8
1100	227	255	112.3	290	127.8	319	140.5
1200	240	270	112.5	307	127.9	338	140.8
1300	253	285	112.6	325	128.5	356	140.7
1400	266	299	112.4	341	128.2	375	141.0
1500	278	315	113.3	359	129.1	394	141.7

*Appendix 10 scale of rates found lawful by the Commission, Report, R. 381.

** Appendix 8 scale present rates, Report, R. 359, 360.

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APPENDIX B.

Commission Reports in Recent Reorganizations of Western Railroads.

Spokane International Ry. Co. Reorganization, 228 I. C. C. 387, 402 (1938); 233 I. C. C. 157, 177 (1939).

Chicago G. W. R. Co. Reorganization, 228 I. C. C. 585, 626 (1938); 233 I. C. C. 63, 81 (1939).

Western Pac. R. Co. Reorganization, 230 I. C. C. 61, 101 (1938); 233 I. C. C. 409, 452 (1939).

Denver & R. G. W. R. Co. Reorganization, 233 I. C. C. 515, 578 (1939); 254 I. C. C. 349, 398 (1942).

Chicago & N. W. Ry. Co. Reorganization, 236 I. C. C. 575, 637 (1939); 239 I. C. C. 613, 644 (1940).

Missouri Pac. R. Co. Reorganization, 239 I. C. C. 7, 134 (1940); 257 I. C. C. 745, 756 (1944).

Chicago M. St. P. & P. R. Co. Reorganization, 239 I. C. C. 485, 570 (1940); 240 I. C. C. 257, 298 (1940).

St. Louis-S. F. Ry. Co. Reorganization, 240 I. C. C. 383, 424 (1940); 257 I. C. C. 399, 435 (1944).

Chicago, R. I. & P. Ry. Co. Reorganization, 242 I. C. C. 298, 479 (1940); 257 I. C. C. 307, 340 (1944).

St. Louis S. W. Ry. Co. Reorganization, 249 I. C. C. 5, 166 (1941); 252 I. C. C. 325, 380 (1942).

Minneapolis, St. P. & S. S. M. Ry. Co. Reorganization, 252 I. C. C. 525, 565 (1942); 252 I. C. C. 615, 638 (1942).

Alton Railroad Company Reorganization, F. D. 14030, September 19, 1945.

Wisconsin Central Ry. Co. Reorganization, F. D. 14720, August 1, 1946, *Examiner's Report*, pp. 2, 49.

Duluth, S. S. & A. Ry. Co. Reorganization, F. D. 11484, January 17, 1947, *Examiner's Report*, pp. 2, 35-36.

APPENDIX C.

Recent Bankruptcies and Receiverships of Western Railroads.

Group of Investors v. *Milwaukee R. Co.*, 318 U. S. 523 (1943); *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 66 S. Ct. 1282, 90 L. ed. 1134 (1946); *Ecker* v. *Western Pac. R. Corp.*, 318 U. S. 448 (1943), *rehearing denied*, 318 U. S. 803 (1943); *Chicago & N. W. Ry. Co.* v. *Bank Committee*, 126 F. 2d 351 (C. C. A. 7th, 1942), *cert. den.*, 318 U. S. 793 (1943), *rehearing denied*, 319 U. S. 781 (1943); *Brooks* v. *St. Louis-San Francisco Ry. Co.*, 153 F. 2d 312 (C. C. A. 8th, 1946), *cert. den.*, 66 S. Ct. 1365 (1946); *St. Louis Southwestern R. Co.* v. *Henwood*, (C. C. A. 8th, 1946), C. C. H. Bkcy. L. Serv. Par. 55,720; *In re Chicago R. I. & P. R. Co.*, 157 F. 2d 241 (C. C. A. 7th, 1946); *In re Chicago Great Western R. Co.*, 32 F. Supp. 217 (N. D. Ill. 1940); *In re Missouri Pac. R. Co.*, 64 F. Supp. 64 (E. D. Mo. 1945); *In re Minneapolis, St. P. & S. S. M. R. Co.*, 48 F. Supp. 330 (D. C. Minn. 1942); *In re Alton Railroad Co.*, (N. D. Ill. 1946), C. C. H. Bkcy. L. Serv. Par. 55,656, 55,773; *In re Spokane International Ry. Co.*, (D. C. Wash. 1940), C. C. H. Bkcy. L. Serv. Par. 52,567; *Wabash Ry. Co. Receivership*, 247 I. C. C. 581; *Duluth, S. S. & A. Ry. Co. Reorganization*, F. D. 11484, January 17, 1947, *Examiner's Report; Wisconsin Central Ry. Co. Reorganization*, F. D. 14720, August 1, 1946, *Examiner's Report.*

APPENDIX D.

Excerpts from Typical Commission Decisions Prescribing Higher Rates for West than for East.

The decisions cited below are typical of those rendered in the many hundreds of proceedings in which the Commission has prescribed the higher rate level in the Western District than that applying in the East. The Commission has taken that action, as it has stated over and over again, because the traffic and transportation conditions in the West impose higher operating costs than are encountered in the East.

Sunflower Glass Co. v. *Missouri Pac. Ry. Co.*, 22 I. C. C. 391, 392 (1912):

> "It is well understood that the general level of rates in central freight association territory east of the Mississippi River is very much lower than that prevailing in territory west of that river."

Wool Rates Investigation, 1923, 91 I. C. C. 235, 272 (1924):

> "We have previously found that differences in transportation conditions and density of traffic justify relatively higher rates in this western territory than in the East."

Rates and Charges on Grain and Grain Products, 91 I. C. C. 105, 131 (1924):

> "The foregoing indicates a reason for a higher unit cost of transportation in the western region and for a generally higher level of rates on all commodities."

Cutler Magner Co. v. *C. M. & S. P. Ry. Co.*, 144 I. C. C. 143, 146 (1928):

"In *Eastern Lime Mfrs. Traffic Bureau* v. *A. & B. B. R. R. Co., supra,* we prescribed for application in central territory a rate of 18.5 cents on lime for 430 miles and over 400. Western trunk-line is admittedly a higher-rated territory than central."

Eastern Live Stock Cases of 1926, 144 I. C. C. 731, 759 (1928):

"Another element which should be considered in this connection is the traffic density. It is well known that the density of all traffic combined is greater in official territory than in western or southern territory, and this fact constitutes a potent reason for the lower rate levels which so frequently prevail in official territory."

Jackson Traffic Bureau v. *Chicago & A. R. Co.,* 152 I. C. C. 684, 685-686 (1929):

"We have frequently recognized that transportation conditions are more favorable in central territory than in western trunk line territory and have approved relatively lower rates for application in the former territory."

Cline & Bernheim v. *Tennessee Central Ry. Co.,* 163 I. C. C. 365, 367 (1930):

"However, we have frequently found that higher rates are justified in the Southwest than in southern and official territories."

Edgar & Son v. *Baltimore & O. R. Co.,* 163 I. C. C. 659, 660 (1930):

"New Orleans and the other east-bank origins are in southern territory, and the origins covered by the complaint are in southwestern territory. The general level of the rates in the territory west of the Mississippi River is higher than that from east-bank points, and this is necessary to enable the carriers on the west side of the river to earn revenues commensurate with those

earned on traffic of greater density at lower rates. *Memphis-Southwestern Investigation*, 80 I. C. C. 157."

Western Trunk-Line Class Rates, 1930, 164 I. C. C. 1 (1930):

"* * * absolute [rate] uniformity in w. t. l. territory is not justified by the record, nor is it practicable. Recognition must be given to the rate relations with adjoining territories, differences existing within w. t. l. territory as evidenced by conditions customarily considered in determining rate levels, and the revenue requirements for w. t. l. respondents. Differences considered in fixing zone boundaries are the averages, throughout the areas, of traffic and population densities, operating conditions, jobbing and other commercial and industrial competitive situations, and the rate basis prescribed in other cases. (p. 198.)

"Both bases give rate recognition to the more favorable transportation conditions found east of w. t. l. Zone I than in w. t. l. territory generally." (p. 208.)

Abbotts Dairies, Inc. v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 216 I. C. C. 661, 665 (1936):

"Western trunk-line territory has a lower freight and passenger traffic density than official territory and on freight traffic is a higher-rated territory."